

No. 90-906-CFX Title: Metropolitan Washington Airports Authority, et al.,  
Status: GRANTED Petitioners  
Docketed: v.  
December 10, 1990 Citizens for the Abatement of Aircraft Noise, Inc.,  
et al.  
Court: United States Court of Appeals for  
the District of Columbia Circuit  
Counsel for petitioner: Coleman Jr., William T., Solicitor  
General  
Counsel for respondent: Goldman, Patti A.  
40 copies ea pet & appd

Entry	Date	Note	Proceedings and Orders
1	Dec 10 1990	G	Petition for writ of certiorari filed.
2	Dec 10 1990		Appendix of petitioner filed.
3	Dec 19 1990		Brief of respondents Citizens Abatement, et al. in opposition filed.
4	Dec 19 1990		DISTRIBUTED. January 11, 1991
5	Dec 19 1990	X	Memorandum of respondent United States filed.
6	Jan 9 1991	X	Brief amicus curiae of Commonwealth of Virginia filed.
7	Jan 14 1991		Petition GRANTED. *****
10.	Feb 26 1991		Order extending time to file brief of petitioner on the merits until March 1, 1991.
8	Feb 27 1991		SET FOR ARGUMENT TUESDAY, APRIL 16, 1991. (1ST CASE)
13	Feb 28 1991		Brief amicus curiae of Commonwealth of Virginia filed.
11	Mar 1 1991		Joint appendix filed.
12	Mar 1 1991		Brief of petitioners Metropolitan Washington Airports Authority, et al. filed.
14	Mar 1 1991		Brief of petitioner United States filed.
15	Mar 4 1991		Record filed. * Certified copy of original record and proceedings received.
16	Mar 6 1991	G	Motion of the Acting Solicitor General for divided argument filed.
17	Mar 18 1991		Motion of the Acting Solicitor General for divided argument GRANTED.
18	Mar 22 1991		CIRCULATED.
19	Mar 29 1991	X	Brief of respondent Citizens for the Abatement of Aircraft Noise, etc. filed.
20	Apr 8 1991	X	Reply brief of petitioners Metropolitan Washington Airports Authority, et al. filed.
21	Apr 9 1991	X	Reply brief of petitioner United States filed.
22	Apr 16 1991		ARGUED.

90-906

No. 90-

U.S. SUPREME COURT, U.S.  
FILED

DEC 10 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Petitioners*,

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT  
NOISE, INC., *et al.*,  
*Respondents*,

UNITED STATES OF AMERICA,  
*Intervenor.*

Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

In 1987, after years of attempts, the federal Executive and Congress, together with the executives and legislatures of the Commonwealth of Virginia and the District of Columbia, united in devising and implementing a successful solution to a longstanding regional transportation problem. Washington National and Washington Dulles International Airports were long owned and controlled by the federal government. While local residents, airport users, airlines, and the airports' owner (the federal government) all recognized the increasing need for a local voice in the governance of the Washington airports, agreement on how to accomplish this change could not be easily or quickly reached.

To overcome this lack of consensus, Secretary of Transportation Elizabeth Dole appointed an advisory commission chaired by former Virginia Governor Linwood Holton. This Commission recommended that control of the airports be transferred to a regional airport authority with a Board of Directors composed of Washington area residents. Virginia and the District of Columbia each accepted the Commission's recommendations and enacted legislation creating an independent regional authority. Congress thereafter authorized the transfer of the airports to the nonfederal authority. One condition of the transfer was that the nonfederal authority establish and appoint a nine-person review board composed of Members of Congress to serve in their individual capacities representing users of the airports. Virginia and the District of Columbia enacted legislation authorizing the authority to have a review board and the regional authority adopted Bylaws providing for the composition, appointment and powers of such board.

It is this carefully crafted airports governing structure that the decision below, by a 2 to 1 vote, holds unconstitutional. Therefore, the questions presented are:

(i)

1. Whether the federal separation of powers doctrine prohibits the Board of Directors of an independent, nonfederal airport authority from voluntarily agreeing in its lease of federal property, consistent with provisions in a federal statute, to establish a Board of Review pursuant to state law and to appoint thereto from proposed lists (and retain the power to remove) nine Members of Congress who will serve solely as representatives of airport users in their individual, non-congressional capacities.

2. Whether a constitutional claim is justiciable when relevant action has not been taken under the challenged statutory provision and the elimination of that provision would not redress the respondents' injury.

#### **PARTIES TO THE PROCEEDINGS**

Petitioners are the Metropolitan Washington Airports Authority and its Board of Review. The Metropolitan Washington Airports Authority is a nonfederal public body corporate and politic with no parent company or subsidiary.

Respondents are Citizens for the Abatement of Aircraft Noise, Inc., John W. Hechinger, Sr. and Craig H. Baab.

The United States of America exercised its statutory right to intervene in the court of appeals pursuant to 28 U.S.C. § 2403(a) (1988) because the constitutionality of an Act of Congress had been challenged.

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*Petitioners,*  
v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT  
NOISE, INC., *et al.*,  
*Respondents,*

UNITED STATES OF AMERICA,  
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**Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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The Metropolitan Washington Airports Authority including its Board of Review hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals reversing the district court is not yet reported but is reprinted as Ap-

pendix ("App.") A at 1a.<sup>1</sup> The opinion of the district court is reported at 718 F. Supp. 974 (D.D.C. 1989), and is reprinted as App. C at 29a.

### JURISDICTION

The opinion and judgment of the court of appeals were entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. App. B at 28a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

### CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

United States Constitution, Article I, Secs. 1; 6, cl. 2; 7, cl. 2 and 3; Article II, Secs. 1; 2, cl. 2; and Article IV, Sec. 3, cl. 2.

The Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 2451-2461 (1988).<sup>2</sup>

1985 Va. Acts ch. 598 and 1987 Va. Acts ch. 665.

D.C. Law 6-67 (1985) and D.C. Law 7-18 (1987).

The constitutional, statutory and other provisions involved are reprinted in App. E at 58a.

### STATEMENT

In recent years, this Court has been presented with an array of unique constitutional questions involving the federal separation of powers doctrine. Each of these cases involved a claim that one branch of the federal government impermissibly interfered with the constitu-

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<sup>1</sup> Page citations to material printed in the Appendix appear as "—a."

<sup>2</sup> All references to the Metropolitan Washington Airports Act of 1986, Pub. L. 99-500, 100 Stat. 1783-373, reenacted in Pub. L. No. 99-591, 100 Stat. 3341-376 (codified at 49 U.S.C. §§ 2451-2461 (1988)) are cited to the relevant statutory section but omit repeated references to "49 U.S.C."

tional powers of another branch of that government. In refereeing the relationship between coordinate federal branches, this Court has adopted a "flexible understanding of separation of powers," upholding innovative and workable solutions to the needs of practical government and approving schemes "that to some degree commingle the functions of the [b]ranches" so long as no one branch "undermine[s] the authority and independence of . . . another coordinate branch." *Mistretta v. United States*, 488 U.S. 361, 381-82 (1989). For example, in *Mistretta* this Court upheld the constitutionality of the United States Sentencing Commission, an independent body within the Judicial Branch composed of judges and others appointed by the President and charged with promulgating binding sentencing guidelines for federal offenders. This Court also upheld the Judicial Branch appointment of an independent counsel to investigate and prosecute alleged crimes by Executive Branch officials in *Morrison v. Olson*, 487 U.S. 654 (1988). In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), this Court found a law allowing a federal agency to adjudicate state law counterclaims arising in connection with administrative proceedings to be constitutional.

This petition addresses yet another challenge on federal separation of powers grounds to a unique institution —this time a nonfederal entity created by the Commonwealth of Virginia and the District of Columbia. This Court has never held that such doctrine was applicable as a matter of federal law where (1) one branch of the federal government purportedly interferes with a branch of a state government, see *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), cert. denied, 395 U.S. 908 (1969), or for that matter, where (2) one branch of a state government interferes with another branch of that government. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). The court below propels the federal separation of powers doctrine into seas un-

charted by this Court and applies such doctrine with a rigidity that conflicts with prevailing precedent.

#### A. Nature of the Case

Historically, commercial airports in the United States were operated by regional, state or local authorities except for Washington National Airport ("National") and Washington Dulles International Airport ("Dulles"). Those two exceptions were owned and operated by the federal government from the time they were built (in 1941 and 1962, respectively) until June 1987. Over the years, several attempts to transfer control of the airports to some type of local ownership had failed. Finally, in 1984 the Secretary of Transportation ("Secretary") appointed the broad-based Advisory Commission on the Reorganization of the Metropolitan Washington Airports (the "Holton Commission," named for its chairman, former Virginia Governor Linwood Holton). A consensus was reached on how best to balance the national, local, airport neighbor and user interests in the airports. See S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The Holton Commission recommended that the federally-owned Washington airports be leased as a unit to an independent regional authority that the Commonwealth of Virginia and the District of Columbia would establish.

To this end, the Commonwealth of Virginia enacted a law on April 3, 1985 creating a regional airport authority to acquire both National and Dulles from the federal government. 1985 Va. Acts ch. 598, App. E at 87a. The District of Columbia approved a substantially identical law on October 9, 1985. D.C. Law 6-67 (1985), App. E at 119a. The Virginia and D.C. statutes, consistent with the recommendations of the Holton Commission, established the Metropolitan Washington Airports Authority as a "public body corporate and politic" "independent" of all state and federal governmental bodies. E.g., 1985 Va. Acts ch. 598, § 2 (89a). The two

jurisdictions empowered the Authority to acquire the airports from the federal government by lease and consented, subject to gubernatorial and mayoral approval, to lease conditions set forth by Congress "that are not inconsistent with [the state] Act." *Id.* § 3 (89a).

A year later, Congress essentially ratified the provisions that Virginia and the District of Columbia had enacted and authorized the transfer of the federal airports to the new regional authority in the Metropolitan Washington Airports Act of 1986 ("Transfer Act"), App. E at 60a; see S. Rep. No. 193, 99th Cong., 1st Sess. 12 (1985). The Transfer Act authorized the Secretary to negotiate a 50-year lease with the state-created Authority and directed that certain terms and conditions be incorporated in the lease. § 2454(a).

The Transfer Act, as provided in the Virginia and District statutes, required the lessee Authority to be independent of the federal, state and local governments. § 2456(b). The Authority was to have only those powers that the legislative authorities of Virginia and the District of Columbia conferred on it. § 2456(a). It was to be governed by an 11-member Board of Directors—five directors appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President of the United States with the advice and consent of the U.S. Senate. § 2456(e)(1). In recognition of the regional interests at stake, the Directors, except for the Presidential appointee, must reside within the Washington metropolitan area. § 2456(e)(2).

To accommodate the interests of nationwide users,<sup>3</sup> Congress provided that the nonfederal regional Authority,

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<sup>3</sup> The Washington airports are, of course, used by citizens who travel from their home residences throughout the United States to the nation's capitol for business or pleasure. Among the more frequent users of Washington airports are Members of Congress who rely upon the availability of convenient air services to and

to be an eligible lessee, should create under state law a Board of Review. § 2456(f). The lessee Authority's Directors were to appoint the Board of Review from lists of Members of Congress on specified committees (except for one at-large member, chosen alternately from the House or Senate) that the Speaker of the House and President *pro tempore* of the Senate provide to the Directors. The Authority's Board of Directors has the right to reject any Member on the list and to request additional names. The Board of Review members that the Authority selects serve "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f)(1). No Member of Congress from Virginia, Maryland, or the District of Columbia may serve on the Board of Review. *Id.* Certain specified actions of the lessee Authority's Board of Directors are to be submitted to the Board of Review at least thirty days before they are to become effective. § 2456(f)(4)(A).<sup>4</sup> An action will take effect unless the Board of Review disapproves it and

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from their home districts. See, e.g., *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040 and S. 1017 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986) ("Members of Congress are heavy users of the air transportation system. Your busy schedules include many trips back to your districts. You depend on the ability to get to the airport quickly, to park quickly, to get to the airplane quickly.") (statement of Secretary Dole); 132 Cong. Rec. S3294 (daily ed. Mar. 25, 1986) ("I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.") (statement of Sen. Danforth).

<sup>4</sup> These actions include the authorization for the issuance of bonds; the adoption, amendment or repeal of a regulation; the adoption or revision of a master plan (including land acquisition proposals); and the appointment of a chief executive officer. § 2456(f)(4)(B). In addition, the adoption of an annual budget is to be submitted at least sixty days before it is to become effective. § 2456(f)(4)(A).

states reasons therefor within the specified time period. § 2456(f)(4)(C).

On March 2, 1987, the Secretary and the state-created Airports Authority completed negotiations and voluntarily entered into a lease (effective June 7, 1987) for the transfer of National and Dulles airports which incorporated, *inter alia*, provisions that are consistent with the Transfer Act. See *Lease of the Metropolitan Washington Airports Authority*, App. E at 163a.

Two days later, the Authority's Board of Directors adopted Bylaws pursuant to the Virginia and District of Columbia statutes. Those Bylaws authorized the Directors to establish a Board of Review and appoint thereto "representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities." Bylaws of the Metropolitan Washington Airports Authority, Art. IV, § 1 (Mar. 4, 1987), App. E at 151a. The Bylaws also set forth the powers of the Board of Review. *Id.* at §§ 4, 5, 6, 7 (153a-154a). Virginia and the District of Columbia expressly authorized the establishment of the Board of Review in amendments to the legislation that they originally passed authorizing the Airports Authority. These amendments were enacted by Virginia and the District of Columbia on April 8, 1987 and June 1, 1987, respectively. 1987 Va. Acts ch. 665, § 5.A.5 (111a); D.C. Law 7-18, § 3(c)(2) (1987) (143a).

By September 2, 1987, the Board of Directors had completed its review of the lists provided by the Speaker of the House and the President *pro tempore* of the Senate and appointed the nine members of the Board of Review. In the two resolutions appointing the Board of Review members, the Board of Directors fixed the terms of each of the appointments by a drawing, but reserved the right to remove a member of the Board of Review for cause prior to the conclusion of his or her term. See Res. No. 87-12 (June 3, 1987); Res. No. 87-27 (Sept. 2, 1978).

On March 13, 1988, the Authority's Board of Directors adopted a Master Plan for Washington National Airport. At its April 13, 1988 meeting, the Board of Review discussed the Master Plan and unanimously voted not to disapprove it.<sup>5</sup>

#### B. Proceedings Below

In November 1988, respondents brought this action seeking declaratory and injunctive relief against the Airports Authority and its Board of Review. Respondents claimed that they are injured by aircraft noise and safety problems allegedly caused by the implementation of a Master Plan for National that the Authority adopted and the Board of Review did not alter or disapprove. Respondents' lawsuit, however, is based not on environmental or safety statutes but on a challenge to the constitutionality of the Board of Review on federal separation of powers grounds. Cross-motions for summary judgment were filed.

On July 20, 1989, the district court (Judge Joyce Hens Green) rejected respondents' constitutional claims.<sup>6</sup> *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*, 718 F. Supp. 974 (D.D.C. 1989), App. C at 29a. The dis-

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<sup>5</sup> In only one instance has the Board of Review disapproved an action by the Board of Directors. On August 9, 1988, the Board of Review voted to disapprove a revision of the Authority's regulations that would permit temporary use of the Dulles Access Highway by high occupancy vehicles. The Board of Review expressed concern that "the use of the Access Highway by carpools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport." Res. No. BOR 88-1 (Aug. 9, 1988).

<sup>6</sup> The district court held, however, that respondents had standing, a holding which petitioners continue to challenge. Even if respondents were to prevail on the merits, the actions that respondents challenge neither caused their alleged injuries nor would the requested relief redress their alleged noise and safety concerns. See *infra* pp. 18-19.

trict court ruled that the Board of Review was not a federal entity, did not exercise federal power, had no members appointed or subject to removal by Congress and, therefore, presented no violation of separation of powers principles or of the Appointments, Incompatibility, or Ineligibility Clauses of the Constitution. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343. In a related case involving the identical constitutional claim in a different factual setting, the district court (Judge Louis F. Oberdorfer) also ruled in favor of the Authority. See Memorandum and Order, *Federal Fire-fighters Association, Local 1 v. United States*, Civil Action No. 88-1022-LFO (D.D.C. Oct. 11, 1989) ("the issue of constitutionality has been resolved at the district court level favorably to [the MWAA] by Judge Joyce Green's thorough opinion in *Citizens for the Abatement of Aircraft Noise v. MWAA . . .*"). App. D at 57a.

On appeal, a divided District of Columbia Circuit panel concurred with the district court's ruling on standing but reversed on the merits. The majority (Buckley, J. and Wald, C.J.) found that the Board of Review is in effect an agent of Congress and therefore cannot constitutionally exercise executive power. Judge Mikva dissented, stating that he would affirm the district court's decision and uphold "a delicately-balanced and innovative institution of federalism." (27a).

On December 6, 1990, the court of appeals stayed its mandate.

## **REASONS FOR GRANTING THE WRIT**

The decision below holds unconstitutional key provisions in a federal statute and, in so doing, invalidates a creative use of this nation's federalism to resolve successfully a long-festered regional transportation problem. In holding part of the governing structure of a state-created entity unconstitutional, the court below rejected the plain language of the statute and instead extended the federal separation of powers doctrine to functions performed by certain Members of Congress serving on a nonfederal board in their individual capacities as representatives of airport users. Such an approach constitutes an unprecedented intrusion of federal separation of powers doctrine into state activity. It further represents a sweeping, rigid and categorical application of that doctrine in conflict with the practical, functional analysis espoused by this Court. The decision, therefore, raises an important issue of first impression that this Court has not, but should, decide concerning the applicability of the federal doctrine of separation of powers to a nonfederal entity.

The decision also conflicts with Property and Spending Clause, appointment, removal and separation of powers decisions of this Court and other federal circuits, including the court of appeals for the Ninth Circuit. The court below failed to recognize that Congress' plenary powers under the Property Clause permit that body, under precedent of this Court, to induce the states indirectly to do certain things that Congress cannot do directly. Moreover, by its rigid extension of the federal separation of powers doctrine, the court below would prohibit Members of Congress from exercising executive functions in state-created agencies even though neither the Constitution nor this Court's jurisprudence prevent states from appointing individual Members to perform such functions. Indeed, such latitude was expressly contemplated by the Founding Fathers when they drafted the Incompatibility

and Ineligibility Clauses of the Constitution. The decision of the court below also fundamentally conflicts with the Appointments Clause decisions of this Court and the other federal circuits in concluding that persons that the nonfederal Airports Authority appointed to its Board of Review, which was created by state law, were nonetheless agents of Congress. Moreover, in finding that Congress could remove Review Board members, the court of appeals overlooked a rule of statutory construction originating at the founding of this country and adhered to consistently by this Court that, in the absence of express statutory language to the contrary, the power to remove is vested in the appointing authority.

Finally, the court of appeal's expansive view of standing erodes the "case or controversy" limitation that the Constitution places on the jurisdiction of the federal courts. The court below did not—and could not, given the record—find that respondents' alleged injury is fairly traceable to any challenged conduct of the Board of Review. Nor does the record support the court's assumption that a favorable ruling will redress any alleged injury.

If the court of appeals' holding is allowed to stand, the federal judiciary will cause serious disruption not only to the airports serving the nation's capitol but also to a unique nonfederal entity that the federal Executive and Congress, together with the executives and legislatures of Virginia and the District, have all approved and supported.

1. The court of appeals sought to determine whether the Board of Review, which the nonfederal Authority established and appointed, is a federal or nonfederal entity by asking whether the Board is "'exercising significant authority pursuant to the laws of the United States . . . ?'" (10a) (*citing Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). The court below reasoned that the Board of Review "exercises oversight responsibilities as a consequence of the [federal] Airports Act" (13a), apparently because the

composition and powers of the Board are set forth in that statute. Consequently, the court concluded that the Board wielded federal power within the meaning of *Buckley* and that federal separation of powers principles should apply. *Id.* This conclusion extends *Buckley* far beyond its intended reach and flagrantly ignores the plain language of the Transfer Act in disregard of this Court's mandate that statutes should be reasonably construed so as to save them from constitutional infirmities. *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979). Moreover, it disregards the findings of the district court that the Board of Review derives its existence and powers from state, not federal, law (specifically, the Authority's Bylaws); that the Board was established by the nonfederal Authority; and that its members are appointed and subject to removal by that nonfederal body, not Congress. (47a).

The Transfer Act provides that it is the "purpose of the Congress . . . to authorize the transfer of operating responsibility under long-term lease of the two Metropolitan Washington Airport properties as a unit, . . . to a properly constituted independent Airport Authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets." § 2452(a). That Act repeats that "[t]he Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia . . ." § 2456(a). The Act further underscores that the Airports Authority shall be

- (1) independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government; and
- (2) a political subdivision constituted solely to operate and improve both Metropolitan Washington Air-

ports as primary airports serving the Metropolitan Washington area.

§ 2456(b). Congress could not have been clearer in its intent to allow Virginia and the District to create an independent, nonfederal entity. See *Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("'[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'") (citation omitted).

The court below does not even mention these statutory provisions. It does acknowledge "that Virginia and the District of Columbia could have walked away from the deal offered by Congress, . . ." (11a), but it fails to recognize the significance of this observation. In concluding that "once the deal was accepted, it is federal law that resulted in the establishment of the Board of Review . . ." (12a), the court overlooks the independent status and actions of Virginia, the District, and the non-federal Authority. See *supra* pp. 4-5, 7-8. Contrary to the court of appeals' analysis, the Transfer Act did not create or empower the Board of Review. The Review Board is a creature of state law and its powers are set forth in the Authority's Bylaws, which the Directors adopted. (153a-154a). The Authority's obligation to establish such a Board is at most contractual, reflecting a condition in the lease negotiated between the Secretary and the Authority. (175a-176a). Virginia and the District freely and voluntarily entered into the arms-length agreement with the Secretary. They could have rejected the offer of a lease (particularly one that requires them to pay at least \$3 million annually in addition to a \$23.6 million initial payment to the Civil Service Retirement and Disability Fund). Their legislative bodies could have refused to pass legislation authorizing the Board of Review. As Judge Mikva observed in his dissent, "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." (22a).

If it were true that the Board of Review wields federal power because Congress described its composition and authority, then the Airports Authority's Board of Directors, which no one challenges, arguably stands on no different footing. Indeed, the court of appeals' expansive logic would federalize any state-created or non-federally created entity that was patterned after a suggestion or condition in a federal statute. Such reasoning denigrates the role of the states as partners in our federal system, able to accept or reject federal conditions on the basis of independent political decisionmaking. It further could raise wholly unanticipated federal obligations and liabilities and impede Congress' ability to encourage states to follow a federal model.

2. No party or court has questioned that Virginia and the District of Columbia could have agreed to create the Authority and its Board of Review as currently structured. *See, e.g.*, Brief for Appellants (Dec. 1, 1989) ("App. Br.") at 39. Moreover, there is no constitutional difference between states (or a state and the District) voluntarily compacting to do something that is constitutional and Congress requesting the states to so act in order to become eligible for the transfer of federal property. Yet the court below strained to create such a constitutional difference and in doing so misinterpreted this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987).

*South Dakota* establishes that an "independent constitutional bar" on direct congressional action is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210. Thus, the court of appeals acknowledged that although the Twenty-first Amendment prohibits Congress from legislating in certain ways with respect to intoxicating liquors, the states could "help Congress achieve objectives beyond its immediate constitutional reach by agreeing themselves to legislate in areas where

they constitutionally can legislate, but Congress cannot." (14a). But the court below erroneously concluded that the logic of *South Dakota v. Dole* does not apply here (*id.*), although the circumstances are fundamentally the same.

In the present case, the court assumed that federal separation of powers principles similarly constrained Congress from doing certain things directly, such as appointing Members of Congress to a Board of Review. However, a state-created entity is free to create a Board composed of Members of Congress because nothing in the Constitution prohibits states from appointing individuals who are Members of Congress to positions created by state law. *See Signorelli v. Evans*, 637 F.2d 853, 861-62 (2d Cir. 1980); II *Elliot's Debates*, vol. 5 at 127, 378, 420-25, 503, 505-06 (2d ed. 1836). In holding that Congress may not use "the same device" that this Court approved in *South Dakota* "to circumvent the functional constraints placed on it by the Constitution," (14a), the court arbitrarily elevates certain constitutional constraints above others, essentially creating a two-tiered Constitution. Apparently functional separation of powers constraints, only implicit in the Constitution, loom larger than other prohibitions, such as the express terms of the Grand Jury Clause of the Fifth Amendment or the Twenty-first Amendment, that the Constitution may place on Congress' powers.

This Court should not accept this proposed exception to the reasoning in *South Dakota v. Dole*. The issue is not whether Congress cannot do something because that power is not found in—or is prohibited by—one constitutional provision rather than another. The issue is whether Congress can induce the states to do something voluntarily that everyone concedes that the states themselves have the power to do. The constitutional limit recognized in *South Dakota* is that Congress may not induce the states to engage in activities that states could not constitutionally

perform (such as to discriminate on the basis of race in administering the Airports Authority). 483 U.S. at 210. But such prohibitions are not implicated here. The decision of the court of appeals places an unwarranted limitation on the *South Dakota* decision and leaves Congress guessing as to which constitutional prohibition may be deemed so important as to invalidate its legitimate efforts to achieve indirectly objectives that it may not achieve directly.<sup>7</sup>

3. The court of appeals' conclusion that the Board of Review created by the independent Authority is nonetheless a federal legislative agent impermissibly performing executive functions (18a-19a) rests on a misapplication of this Court's appointment and removal cases. The court below found that *Bowsher v. Synar*, 478 U.S. 714 (1986) and *Mistretta v. United States*, 488 U.S. 361 (1989), which clearly govern this case, were "unpersuasive." (17a). That court's reasoning, if left undisturbed, will confuse appointment and removal law that this Court has clarified and will limit Congress' legitimate discretion to provide its own views (or authorize others to provide their views) in the appointment process.

The court below did not find that Congress appointed anyone. In fact, the Governors of Maryland and Virginia, the Mayor of the District of Columbia and the President of the United States appoint the Directors of the Authority. These nonfederal Directors in turn appoint the members of the Board of Review from lists of names (which

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<sup>7</sup> Indeed, although the court below stated that it need not reach the respondents' Ineligibility and Incompatibility Clause claims (19a), the majority's holding that individual Members of Congress could not perform executive functions in fact added additional constraints to those Clauses that the Founding Fathers deliberately avoided placing on our constitutional and federal system. Nothing in either of those Clauses prohibits an individual Member from serving in any state-created office (including one in which executive functions are vested) or as a member of a public corporate body independent of the federal government. See U.S. Const. art. I, § 6, cl. 2.

the Directors are free to reject) that are submitted by the Speaker of the House and the President *pro tempore* of the Senate. In *Bowsher*, this Court did not condemn the congressional requirement that the Speaker of the House and the President *pro tempore* of the Senate recommend a list of three individuals to the President from whom he nominates the Comptroller General. 478 U.S. at 727. Similarly, this Court upheld Congress' power to require the President to appoint three judges to the Sentencing Commission from a list of six judges recommended by the Judicial Conference of the United States. *Mistretta*, 488 U.S. at 410 n.31. There is no principled distinction between these situations and the present case.

The court below erred in finding *Mistretta* inapposite and erected a constitutional distinction where none exists. The court of appeals believed that *Mistretta* offered no guidance because it involved potential Executive interference with the Judiciary (or vice versa) rather than congressional interference with executive powers. (19a). But there is no basis for analyzing alleged interference with executive appointment powers differently depending on whether a proposed list comes from Congress or from the Judiciary. The interference, if any, that may be inherent in allowing the congressional or judicial branches to submit lists of nominees to an executive appointing authority is constitutional so long as the appointing authority retains ultimate responsibility in the selection of its appointees.

Further, the court of appeals' holding, in reliance on *Bowsher*, that Congress has the power to remove members of the Board of Review (18a) is unsupported by either the facts or the law. Nothing in the Transfer Act authorizes Congress to interfere with the Authority's power to remove its appointed officials. Even appellants concede that the absence of any congressional removal power "eliminates one source of unconstitutionality." See App. Br. at 35. The law, articulated by Madison, is that "the

power of removal result[s] by a natural implication from the power of appointment." 1 Annals of Cong. 496 (J. Gales ed. 1789). The Authority properly recognized that removal authority is vested in the appointing authority in the absence of express legislation to the contrary in Resolutions Nos. 87-12 and 87-27, which empowered the Board of Directors to remove members of the Board of Review for cause. The Board of Directors' authority to remove its appointees—the Board of Review—is thus consistent with a longstanding principle of federal law that this Court repeatedly has affirmed, *see Carlucci v. Doe*, 488 U.S. 93, 99 (1988); *Myers v. United States*, 272 U.S. 52, 119 (1926), and with relevant state law. *See, e.g.*, Va. Code Ann. 24.1-79.6. Contrary to the court of appeals' conclusion (18a-19a), this case is wholly unlike *Bowsher v. Synar*, where this Court found Congress' power to remove an officer charged with execution of the law unconstitutional.

4. Even if, contrary to the facts, the Board of Review were an agent of Congress, it would not be interfering with a coordinate branch of the federal government here. At most (if it were ever to disapprove an action of the Authority's Directors that also caused injury to some private party, which is not the case here), it would be trenching on the powers of a nonfederal entity in circumstances where the relevant state and local governments had given their consent. To condemn such action under the rubric of the judicially-developed federal doctrine of separation of powers would conflict with *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969). That case holds that the federal separation of powers doctrine "has no application in the area of federal-state relations." *Id.* at 501.<sup>8</sup>

5. No findings supported the district court's conclusion, adopted by the court below (9a), that ripeness was

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<sup>8</sup> Neither respondents nor the court of appeals cited specific case law to the contrary to support their view that federal separation of powers principles apply in this case.

established here because the case "is as ripe as it will ever be." (38a). A case can be almost ripe forever and never amount to a case or controversy for purposes of judicial intervention. *See Clark v. Valeo*, 559 F.2d 642, 649 (D.C. Cir.) (*en banc*), *aff'd without opinion*, 431 U.S. 950 (1977). Here, the Board of Review has never taken any action that affects the claims alleged by respondents. Particularly in a case of first impression where respondents ask the judiciary to upset on constitutional grounds the delicate balance wrought by both federal and state legislators and executives, *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), a court should not rest on mere speculation.

Further, the district court, as affirmed by the court of appeals (9a), found only (without evidentiary hearing and despite petitioners' protests) that respondents' alleged injuries are "fairly traceable" to the Master Plan (41a). It did not find that those alleged injuries could be traced to the mere existence of the Board of Review, which took no action that affected the Master Plan in any respect. Yet it is only the Board of Review and not the Master Plan that respondents have challenged.

Nor did the district court or the court of appeals adequately address the essential link between the complained of injury and the relief requested. Eliminating the Board of Review (and all the consequences of that action) simply would not redress their injuries by reducing aircraft noise or promoting safety. *See, e.g.*, § 2454 (c)(5)(C); Brief for Defendants (Jan. 30, 1989), Exh. 8.

The unprecedented approach of the court of appeals would extend separation of powers principles to non-federal entities in a rigid categorical manner, contrary to the functional analysis adopted by this Court and in conflict with well-established appointment and removal law. *See, e.g.*, *Mistretta*, 488 U.S. at 380-84, 408-410; *United States ex rel. Stillwell v. Hughes Helicopters*,

*Inc.*, 714 F. Supp. 1084, 1086-87 (C.D. Cal. 1989). Unless reversed, the decision will hamper the ability of the federal government to work with state and local entities to solve regional problems and will unduly constrain Congress in disposing of federal assets consistent with the Property Clause.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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90-906<sup>(2)</sup>

No. 90-

IN THE

Supreme Court, U.S.

FILED

DEC 10 1990

JOSEPH F. SPANOL, JR.  
CLERK

Supreme Court of the United States

OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT  
NOISE, INC., *et al.*,  
*Respondents,*

UNITED STATES OF AMERICA,  
*Intervenor.*

Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued April 9, 1990

Decided October 26, 1990

No. 89-7182

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,

*Appellants*

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*

ATTORNEY GENERAL,

*Intervenor*

---

Appeal from the United States District Court  
for the District of Columbia

(D.C. Civil Action No. 88-03319)

---

*Patti A. Goldman*, with whom *Alan B. Morrison* was  
on the brief, for appellants.

*William T. Coleman, Jr.*, with whom *Donald T. Bliss*,  
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the brief, for appellees.

*Douglas Letter*, Attorney, Department of Justice, with  
whom *Stuart M. Gerson*, Assistant Attorney General, and  
*Jay B. Stephens*, United States Attorney, were on the  
brief, for intervenor.

Before *WALD*, Chief Judge, and *MIKVA* and *BUCKLEY*,  
*Circuit Judges*.

Opinion for the court filed by *Circuit Judge BUCKLEY*.  
 Dissenting opinion filed by *Circuit Judge MIKVA*.

**BUCKLEY, Circuit Judge:** Citizens for the Abatement of Aircraft Noise challenge the constitutionality of certain conditions attached by Congress to the transfer of two federally owned and operated airports to a regional airport authority created by the Commonwealth of Virginia and the District of Columbia. Specifically, they contest the legitimacy of the Board of Review, composed entirely of members of Congress, which the Authority was required to establish as a specific condition to the transfer of the airports. Because we find that the Board is effectively an agent of Congress and that its functions are executive in nature, we conclude that the Board is prohibited by the constitutional doctrine of the separation of powers from carrying out those functions.

#### I. BACKGROUND

##### A. Legislative Background

The Washington, D.C., metropolitan area is served by two major airports, Washington National and Washington Dulles International. These are owned by the Federal Government and were operated by it from the time they were opened (in 1941 and 1962, respectively) until March 1987, when they were leased to the newly formed Metropolitan Washington Airports Authority ("MWAA" or "Authority"). Their history of federal ownership and control is unique, as all other civilian airports in the country are operated by local, state, or regional authorities. Because of the importance of National and Dulles to the economic development of Northern Virginia and the District of Columbia, there have been several unsuccessful attempts over the years to transfer control of the airports to local authorities. In 1984, a commission under the chairmanship of former Virginia Governor A. Linwood Holton issued a report that provided the necessary catalyst for the relinquishment of federal control.

The Holton Commission recommended that the airports be turned over to an independent regional authority to be established by the Commonwealth of Virginia and the District of Columbia. To this end, the Virginia Assembly passed legislation authorizing the creation of the Metropolitan Washington Airports Authority. See 1985 Va. Acts ch. 598. The District of Columbia followed suit. See D.C. Law 6-67, 32 D.C. Reg. 6,093, 7,393 (1985). These acts empowered the Authority to acquire the airports by lease or otherwise, to issue bonds, carry out expansion plans, and perform other acts necessary to the task of administering the airports. Neither the Virginia nor the D.C. legislation provided for a special board with the power to veto the actions of the Authority and its governing board.

At about the same time, Congress also began work on legislation to implement the Holton Commission's recommendations and, on April 11, 1986, the Senate approved a bill that provided for a straightforward transfer of control over the airports to the Authority. 132 Cong. Rec. 7,263-81 (1986). Subsequently, in the course of the House Subcommittee on Aviation's consideration of the measure, its staff prepared drafts of three proposals for the establishment of a board composed of members of Congress that would have the power to review and disapprove actions taken by the new Authority.

Under the first proposal, Congress would create a "Federal Board of Review" having the power to veto Authority decisions. This board would consist of the Comptroller General plus three members appointed by the House and three by the Senate. The second proposal would require that the board be established by state law as a condition for the transfer of the airports to the Authority. Its congressional members, however, would continue to be appointed directly by their respective houses. Under the third proposal, the members would be selected by the Authority's Board of Directors from

names submitted by the congressional leadership and would serve in their individual capacities as representatives of the airports' users.

In an advisory letter addressed to the Subcommittee Chairman, Assistant Attorney General John R. Bolton ("AAG") expressed the view that the first approach was clearly unconstitutional, as it sought to establish a committee of Congress vested with the authority to take legislative action—in the form of a veto—without meeting the Constitution's Bicameralism and Presentment requirements, namely, that legislative acts be approved by both houses of Congress and presented to the President for his approval or veto. *See Letter from Asst. Att'y Gen. J. Bolton to Rep. N. Mineta*, at 1-2 (Aug. 6, 1986). Moreover, as at least some of the functions to be performed by the proposed board were "clearly operational" in nature, performance of them by members of Congress would violate the Constitution's Incompatibility and Appointments Clauses, which forbid officers of the United States from serving in Congress and require such officers to be appointed by the President. *Id.* at 2-3.

While the second proposal addressed some of these concerns by having the board created by state law rather than directly by Congress, the AAG concluded that this alternative was similarly flawed because Congress, through its agents, would still be exercising direct control over the operations of the airports. *Id.* at 5-7. The AAG, however, found the third proposal constitutionally acceptable, although not free from doubt. He reasoned that as the members would be representing their own interests as airport users, their membership on the board would not implicate separation-of-powers concerns. *Id.* at 7-8. Nevertheless, his letter suggested that efforts should be made to minimize the institutional role of Congress in the board's affairs, as the avoidance of constitutional difficulties turned on the board members' representing only their individual interests. *Id.* at 8.

This third proposal was adopted with minor modifications and was signed into law as the Metropolitan Washington Airports Act of 1986. 49 U.S.C. app. §§ 2451-2461 (Supp. V 1987) ("Airports Act"). The Airports Act authorized a long-term lease of National and Dulles Airports to the Authority created by Virginia and the District of Columbia. Under its terms, however, the Authority was required to establish a board of review composed entirely of members of Congress, with the power to veto certain actions of the Authority. 49 U.S.C. app. § 2456(f).

In response to this congressional action, Virginia and the District amended their respective statutes to empower the Authority to create such a board. 1987 Va. Acts ch. 665, § 5(5); D.C. Law 7-18 § 3(c)(2), 34 D.C. Reg. 3,805, 5,249 (1987). These acts, however, did not require the Authority to establish a review board, nor did they specify what its composition or powers would be in the event the Authority decided to create one. By contrast, the Airports Act not only required the Authority to establish the present Board of Review as a condition for the lease of the airports, but described its composition and powers in great detail:

The [Authority's] board of directors shall be subject to review of its actions . . . by a Board of Review of the Airports Authority. Such Board of Review shall be established by the board of directors and shall consist of the following, in their individual capacities, as representatives of users of the Metropolitan Washington Airports:

(A) two members [from each of two named House committees] from a list provided by the Speaker of the House;

(B) two members [from each of two named Senate committees] from a list provided by the President pro tempore of the Senate; and

(C) one member chosen alternately from members of the House of Representatives and members of the Senate, from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.

49 U.S.C. app. § 2456(f)(1).

The Act required that the Board be granted the power to disapprove the following decisions of the Authority:

- (i) the adoption of an annual budget;
- (ii) the authorization for the issuance of bonds;
- (iii) the adoption, amendment, or repeal of a regulation;
- (iv) the adoption or revision of a master plan, including any proposal for land acquisition; and
- (v) the appointment of the chief executive officer.

*Id.* § 2456(f)(4). The Act then states that in the event the Board is

unable to carry out its functions under this subchapter by reason of a judicial order, the Airports Authority shall have no authority to perform any of the actions that are required by [subsection (f)(4)] to be submitted to the Board of Review.

*Id.* § 2456(h).

After the enactment of this legislation, the Secretary of Transportation entered into a lease with the Authority on March 2, 1987. Six months later its board of directors completed selection of the Board of Review from the lists submitted by the Speaker of the House of Representatives and the President pro tempore of the Senate. On March 13, 1988, the Authority adopted a Master Plan for the renovation of National and Dulles International Airports. On April 13, 1988, the Board of Review voted not to disapprove the Plan, which is now being implemented.

#### B. Procedural Background

On November 16, 1988, Citizens for the Abatement of Aircraft Noise and two of its individual members (collectively, "Citizens") filed this lawsuit seeking declaratory and injunctive relief. They sought an order declaring that the Board of Review's disapproval authority was unconstitutional, and an order prohibiting the Board from taking any action under the Airports Act and barring the Authority from taking any action that would have to be submitted to the Board pursuant to the Act.

Citizens argued that the Board of Review was unconstitutional on several grounds. First, they claimed, on the basis of *INS v. Chadha*, 462 U.S. 919 (1983), that its veto power represents "an extra-constitutional check on the execution of the law." *Citizens for the Abatement of Aircraft Noise v. Metropolitan Washington Airports Authority*, 718 F. Supp. 974, 983 (D.D.C. 1989) (internal quotes omitted). In *Chadha*, the Supreme Court struck down the provision in the Immigration and Nationality Act, 8 U.S.C. § 1254(e)(2), providing for the veto by either house of Congress of decisions of the Attorney General to allow particular deportable aliens to remain in the United States. The Court held that when Congress takes action that is legislative in character, it must meet the Bicameralism and Presentment requirements of the Constitution. See 462 U.S. at 951-59. Actions were deemed "legislative in character" if they affected the legal rights and responsibilities of persons outside the Legislative Branch. See *id.* at 952. Citizens argued that a Board veto, like the one-house veto, would be such a legislative act, and therefore, under *Chadha*, the Board could not constitutionally exercise such power in the absence of passage by both houses and presentation to the President.

Next, Citizens alleged that the functions of the Review Board are executive in nature, as they involve the opera-

tion of the airports. As such, the assumption of these powers by the members of Congress serving on the Board violated the doctrine of the separation of powers. 718 F. Supp. at 982. This doctrine, which is explained in *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986), prohibits legislative officers from performing executive functions. Finally, according to Citizens, the executive nature of the Board's functions means that members of Congress cannot serve thereon without violating the Incompatibility and Ineligibility Clauses. U.S. Const. art. I, § 6, cl. 2.

The MWAA questioned the justiciability of Citizens' claims on several grounds. On the merits, it challenged the view that the members of the Board were in fact beholden to Congress. The MWAA stated that the Act made the Board a separate entity whose members, unlike the Comptroller General in *Bowsher*, were not removable by Congress and hence not subject to its control; that the Authority was statutorily independent of the Federal Government, 49 U.S.C. app. § 2456(b)(1); and further, that the members of the Board served "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." *Id.* § 2456(f)(1). The MWAA also asserted that the authority being exercised by the members was not, in any event, federal power: As the Authority and its creature, the Board of Review, were established in accordance with state law, no federal separation-of-powers question was raised.

The district court found that the claim was justiciable, but ruled for the defendants on the merits. 718 F. Supp. 974 (D.D.C. 1989).

## II. DISCUSSION

### A. Justiciability

As a threshold matter, we must consider whether this case is justiciable. Although the Authority has not pressed the issue on appeal, it is well established that a

court of appeals must first satisfy itself of its own jurisdiction, *sua sponte* if necessary, before proceeding to the merits. See *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

In the district court, the Authority argued that Citizens' claims were not ripe, that they had failed to exhaust their administrative remedies, and that they lacked standing to bring their constitutional claim. We agree with the district court that the first two issues warrant little discussion, and we find appellants' claims ripe and not precluded by the administrative exhaustion requirement substantially for the reasons given by the court.

We have little doubt, moreover, that appellants have alleged the distinct and palpable injury required to bring an action in federal court. To claim Article III standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Appellants' claim that they are adversely affected by noise, air pollution, and the risks of injury associated with flights in and out of National is not challenged. See 718 F. Supp. at 981. Furthermore, that harm is "fairly traceable" to the implementation of the Master Plan, which provides for a significant increase in air traffic, because only with the Board of Review in operation can the Authority carry it out. See *id.* Lastly, it is obvious that a favorable ruling will redress Citizens' alleged injuries, because if the Board's actions are invalidated, then, under the provisions of the Act, the Authority will be unable to implement the Plan and continue expansion.

Having concluded that appellants have demonstrated Article III standing for the reasons stated above, we do not address the independent basis for standing found by the district court.

## B. The Merits

As an initial matter, we must address appellees' contention that separation-of-powers principles do not apply to the Board of Review in the first instance. They argue that as the Board does not exercise federal power and is not a federal entity, federal separation-of-powers principles are inapplicable. *See Appellees' Brief at 34.* Appellees imply, moreover, that even if those principles might otherwise apply, it is now accepted that Congress may use its powers under the Property Clause to create conditions on grants of federal property and thus "to achieve indirectly objectives that it is not empowered to achieve directly." *See id.* at 28. We turn first to these contentions.

### 1. *Applicability of Separation-of-Powers Principles*

#### a. *Nature of Power Exercised by Board of Review*

Appellees' first argument for the non-applicability of separation-of-powers principles rests on the claim that the Board is not a federal entity and wields no federal powers. We will find that the Board wields federal power if we determine that it is "exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Although the Supreme Court enunciated this test in determining whether members of the Federal Election Commission were officers of the United States, we find the test equally applicable here, for the issue in both cases turns on whether the power wielded by a person or body has its source in federal authority.

The MWAA argues that because statutes of Virginia and the District of Columbia created the Authority and conferred on it the power to create the Board of Review, the latter is in fact a creature of state law. The Virginia and D.C. statutes, however, provide for none of the trou-

blesome characteristics of the Review Board, such as a membership limited to members of Congress and the power to veto major actions of the Authority. Rather, it is the federal Airports Act that defines the Board's character. *See 49 U.S.C. app. § 2456(f).* The MWAA contends, nevertheless, that the Board of Review exercises no federal power because it derives its authority from the bylaws of an independent regional entity and participates in decisionmaking functions that are common to local airport authorities throughout the country. *Appellees' Brief at 32.*

We find it irrelevant that the Board may be performing a function generally discharged by local authorities in other areas. The federal power includes the power to build, own, and operate airports. If the authority exercised by the Board over the operation of National and Dulles is derived from a federal source or exercised on behalf of the federal government, then separation-of-powers principles apply irrespective of the fact that the powers at issue are similar to those enjoyed by states or localities. Moreover, even though it is true, as the Authority asserts and the district court concluded, that Virginia and the District of Columbia could have walked away from the deal offered by Congress, their acceptance of the offer does not mean that the terms attached to it cannot result in an exercise of federal power. Nor is there any significance in the fact that the federal government was acting in a proprietary capacity when it required the Authority to create the Board as a condition to the lease of the airports. Whether Congress was legislating as sovereign or proprietor, any reservation of federal authority is subject to separation-of-powers constraints. *See Springer v. Government of the Philippine Islands*, 277 U.S. 189, 202-03 (1928) (whether government deals with property in sovereign or proprietary capacity, it "nevertheless acts in its governmental capacity").

In order to secure the lease of the airports that are its sole reason for existence, the Authority had to create a board with the composition and authority dictated by the federal statute:

The board of directors *shall* be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Airports Authority. Such Board of Review *shall* be established by the board of directors and *shall* consist of the following . . . .

49 U.S.C. app. § 2456(f)(1) (emphasis added). It is thus clear to us that, once the deal was accepted, it is federal law that resulted in the establishment of the Board of Review with its particular composition and authority. If there were any doubt about the matter, the provision in the statute disabling the Authority from performing many of its critical functions in the event the Board of Review is invalidated by judicial order makes plain that the law functions to maintain a federally mandated presence in the operation of the airports. See 49 U.S.C. app. § 2456(h).

In this light, it is wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny. The district court itself noted the Supreme Court's caution that "separation-of-powers analysis does not turn on the labelling of an activity, but rather focuses on the unique aspects of the congressional plan at issue and its practical consequences." 718 F. Supp. at 983 (quoting *Mistretta v. United States*, 109 S. Ct. 647, 665 (1989)) (internal quotes and citations omitted). The court failed to see, however, that the "practical consequences" of the current arrangement are to maintain in place by federal law a body composed exclusively of members of Congress that exercises operational control over the airports.

The district court thus begs the question when it concludes that separation-of-powers principles do not apply because Congress has not accreted powers to itself at the expense of the Executive, but rather has offered the airports to the Authority subject to conditions that the Authority, not Congress, has implemented. *See id.* at 986. As the Board exercises oversight responsibilities as a consequence of the Airports Act, separation-of-powers principles dictate that such oversight, like any exercise of federal power, be carried out in a manner consistent with the Federal Constitution.

*b. Whether Board of Review Provision Is Legitimate as Valid Exercise of Congress's Property Clause Powers*

In an argument based on the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987), the MWAA maintains that the Board, as constituted and empowered, is nevertheless legitimate because it was created in the course of Congress's lawful exercise of its extensive power under the Property Clause to dispose of federal property. Even if Congress could not constitutionally establish the Board directly, this argument runs, it has the power under the Property Clause to achieve the same result indirectly.

In *South Dakota*, the Court upheld a federal law directing the Secretary of Transportation to withhold five percent of otherwise allocable federal highway funds from States that did not have a minimum drinking age of at least twenty-one years. South Dakota had argued that the law violated the Twenty-first Amendment's reservation of power over intoxicating liquors to the States. The Court ruled that even assuming that Congress lacked the authority, in light of the amendment, to legislate a national minimum drinking age directly, nonetheless its powers to spend for the "general Welfare" were broad enough to sustain the conditions. *See id.* at 206-09. Not-

ing that Congress's powers under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, are as broad as those under the Spending Clause, *id.*, art. I, § 8, cl. 1, the Authority now suggests that Congress may circumvent the limitations on its authority imposed by the separation-of-powers doctrine by placing appropriate conditions on the transfer of government property. *See Appellees' Brief at 27-28.*

We believe the present case is distinguishable from *South Dakota*. It is well established that Congress may use its Spending Clause powers to advance policies that lie beyond the reach of its constitutional authority to legislate directly. *See United States v. Butler*, 297 U.S. 1, 66 (1936). Thus, as the Court reasoned in *South Dakota*, the "independent constitutional bar" on direct congressional action is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210. Congress may make valid use of its Spending and Property Clause powers to achieve, through economic incentives, objectives that it might not be able to mandate directly. It does not follow, however, that Congress may use the same device to circumvent the functional constraints placed on it by the Constitution.

In the former case, the States help Congress achieve objectives beyond its immediate constitutional reach by agreeing themselves to legislate in areas where they constitutionally can legislate, but Congress cannot. They do this in exchange for an economic benefit provided by Congress in the exercise of its Spending (or Property) Clause powers. In the instant case, by contrast, Virginia and the District of Columbia cannot authorize Congress to exercise functions forbidden it by the Constitution. If federal power is wielded, then that power must be wielded in a constitutional manner. Thus, we conclude, *South Dakota* does not remove this case from separation-of-powers scrutiny.

## 2. Application of Separation-of-Powers Principles to Board of Review

Having concluded that separation-of-powers principles are applicable to this case, we must now determine whether the Board of Review operates in conformity with them.

In support of their argument that the Board's structure violates the basic requirement that Congress not perform executive functions, appellants make two claims that appear at first inconsistent. First, they argue that the Airports Act gives to a group under the control of Congress an executive function, namely, the power to oversee the Authority's management of the airports. *See Appellants' Brief at 30.* Appellants argue, at the same time, that the Act violates the Bicameralism and Presentment requirements enunciated in *Chadha* because it grants the Board a veto power over the Authority. *See id.* These claims appear inconsistent because the first assumes that the Board is performing an executive function, in violation of *Bowsher*, while the second assumes that the Board, in exercising its veto powers, is performing a legislative function without benefit of Bicameralism and Presentment, in violation of *Chadha*.

In reality these positions are not logically inconsistent but rather two sides of the same theoretical coin, by which Congress must either stay clear of executive decisions once a legislative grant of authority has been made or intervene only with new, validly enacted law. *See Chadha*, 462 U.S. at 954-55 (once Congress confers power on the Executive, it must "abide by its delegation of authority until that delegation is legislatively altered or revoked"). Here, there is no claim that the actions of the Board of Review would satisfy the Bicameralism and Presentment requirements enunciated in *Chadha*. But because we find that the operation of the Board of Review partakes of an executive function, and that the Board is in essence a congressional agent, we invalidate

it under the first of appellants' claims without expressing a view on the second.

*Bowsher*, we believe, is the relevant touchstone for what constitutes an executive function. In *Bowsher*, the Supreme Court focused on the fact that the Balanced Budget and Emergency Deficit Control Act of 1985 contemplated that the Comptroller General would exercise independent judgment and evaluations with respect to the execution of various budget-cutting measures. See 478 U.S. at 732-33. The Court determined, first, that "because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers." *Id.* at 732. It then found the authority vested in the Comptroller General to be unconstitutional because, although an agent of Congress, he was required to exercise responsibilities of an executive nature.

In this case, the Board is given disapproval powers over the adoption of an annual budget, the authorization of the issuance of bonds, the adoption, amendment, or repeal of any regulation, the adoption or revision of a master plan for airport expansion, as well as the appointment of the MWAA's chief executive officer. See 49 U.S.C. app. § 2456(f)(4)(B). This authority over key operational decisions is quintessentially executive.

We must now address whether the Board of Review is controlled by Congress, and again *Bowsher* will be our guide. The Authority argues, and the district court concluded, that although the Board was composed of members of Congress, it was nonetheless independent of Congress. See 718 F. Supp. at 984-85. In reaching that conclusion, the court cited the provision of the Airports Act which states that the members of the Board will act "in their individual capacities, as representatives of [the airports'] users," 49 U.S.C. app. § 2456(f)(1), and found, *inter alia*, that Congress did not have the power

to remove members of the Board of Review because the Act was silent on the matter. See *id.* at 983-84.

We believe the court misjudged the extent to which members of the Board must, as a practical matter, be seen as representatives of Congress rather than of the airports' general users. Eight of the nine Board members are required by the Act to be members of the committees that have direct jurisdiction over commercial aviation, and all of them are selected from lists submitted by the presiding officers of the two houses of Congress. These provisions reflect a direct congressional interest in the operational decisions of the Authority that the members of its Review Board, as sitting members of Congress, will find it difficult to ignore.

The district court dismissed these ties between the Board and Congress by pointing to precedents for appointments being made from similarly limited lists. See 718 F. Supp. at 984 & n.16. Specifically, the district court noted that the Supreme Court "expressed no qualms" about the fact that the Comptroller General was appointed from a list of three individuals provided by the Speaker and the President pro tempore, citing *Bowsher*, and that the Judicial Conference of the United States submits the names of six judges for three appointments to the United States Sentencing Commission, citing *Mistretta*. *Id.* These comparisons are unpersuasive.

First, the district court erred in its reliance on *Mistretta*. The portion of that case cited by the court, see *id.*, dealt not with whether Congress had invaded the Executive's domain by reserving to itself excessive control over the selection and removal process, but rather with the distinct question of whether the Executive's appointment and removal authority over members of the Sentencing Commission threatened the independence of the Judiciary. See 109 S. Ct. at 673-74. Second, in neither of the examples cited by the district court did the names on the lists submitted consist of members of

Congress. In the instant case, the lists contained exactly that—the names of individuals who will continue to serve as full-time members of the Senate or the House of Representatives and, in the case of all but one of them, on committees directly concerned with the formulation of congressional policies affecting commercial aviation. Given these continuing institutional ties, we are unable to conclude that the members of the Board are truly independent and that they can realistically be expected to act as representatives of users other than those with whom they work on a daily basis on Capitol Hill.

Moreover, contrary to what the district court found, Congress does have the power to remove members of the Board. The Act specifically requires that the Board "shall consist of" members of specified committees of the House and Senate. As each house has the right to remove any of its members from any committee at any time, Congress has the power to disqualify any one or more of them from further service on the Board. It could be argued, of course, that Congress would be unlikely to discipline members of the Review Board by removing them from their qualifying committees. Nevertheless, as the Supreme Court noted in *Bowsher*, in response to the objection that Congress was unlikely to remove the Comptroller General,

[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. . . . In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

478 U.S. at 730.

We thus conclude that the Board of Review as currently established violates the constitutional prohibition, articulated in *Bowsher*, against legislative agents per-

forming executive functions. As we invalidate the Board on these grounds, we do not reach appellants' claims based on the Incompatibility and Ineligibility Clauses.

### III. CONCLUSION

We have determined that Citizens' claims are justiciable, and that the Board of Review, as currently constituted, unconstitutionally vests executive functions in an agent of Congress. The judgment of the district court is reversed and the case remanded with instructions to grant Citizens' request for declaratory and injunctive relief. We direct, however, that actions taken by the Board to this date not be invalidated automatically on the basis of our decision. See *Buckley v. Valeo*, 424 U.S. at 142 (past acts of invalidly constituted Commission accorded "*de facto validity*").

*It is so ordered.*

MIKVA, *Circuit Judge*, dissenting: The court today strikes down an important governing authority and tells the U.S. Congress that it may not pass legislation permitting the federal government and the governments of Virginia and the District of Columbia to share responsibility for the operation of Washington's two major airports. Ignoring the time-honored canons that counsel restraint in constitutional interposition, the court destroys the carefully crafted plan for governance that Congress devised, creating an obstacle course to federalism that no Supreme Court precedent requires. I would affirm the district court's decision granting summary judgment in favor of the Metropolitan Washington Airports Authority (the "Authority"). *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airport Authority*, 718 F. Supp. 974 (D.D.C. 1989).

## I.

The majority's fundamental error is its failure to honor the cardinal rule of statutory interpretation that courts should construe statutes so as to avoid rather than implicate constitutional questions. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (citation omitted)); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (explaining that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). Indeed, such a rule of construction has long influenced this Circuit's jurisprudence. *See, e.g., Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1369 (D.C. Cir. 1988); *Hastings v. Judicial Conference of U.S.*, 829 F.2d 91, 101-02 (D.C. Cir. 1987), cert. denied,

485 U.S. 1014 (1988); *Loveday v. FCC*, 707 F.2d 1443, 1459 n.24 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983). As the Supreme Court has stated specifically with regard to separation of powers challenges: "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, . . . it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (Stevens, J., concurring)). I find no such "compelling constitutional reasons" in this case to justify the majority's departure from the traditional rule of restraint.

## II.

Congress created neither the Authority nor its Board of Review (the "Board"). Both of those entities were created by the actions of Virginia and the District of Columbia. The court decides, however, that because the federal Airports Act (the "Act") describes the Board's composition and its power to veto certain Authority actions, the Board is a federal entity wielding federal powers, subject to separation of powers constraints. Although my primary disagreement with the court concerns its actual application of separation of powers principles to the facts of this case, I also question the court's characterization of the Board as a federal entity. It is certainly possible to view the Board as the district court did: The Airports Act authorizes the Secretary of Transportation to lease Dulles and National Airports to "a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia," 49 U.S.C. app. §§ 2452(a), 2454(a) (1988), and establishes certain conditions concerning the Board of Review that must be contained within the lease. 49 U.S.C. app. § 2456(f), (h). Both the Commonwealth of Virginia and the District of Columbia passed the requisite enabling legislation for the regional Authority, whose by-

laws in turn establish the Board of Review and define its powers and composition. The fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage. If the Board derives its power from state law, then separation of powers principles—at least those that divide and allocate the sovereign power of the federal government along the three branches—would not constrain its actions.

### III.

Even assuming, however, that the Board of Review is a federal entity exercising federal power, I do not believe that it violates constitutional separation of powers principles. The court, adopting *Bowsher* as “the relevant touchstone,” finds the Board unconstitutional because it exercises “quintessentially executive” functions while under the control of Congress. Maj. Op. at 15. The court’s conclusion that the Board is controlled by Congress rests on: (1) its concern about the appointment of legislators to the Board from lists provided by congressional leaders; and, most importantly, (2) Congress’ alleged possession of removal power. I examine each concern in turn.

#### A. The Appointment Process

Under Article IV, Section 1 of the Authority’s bylaws and Section 2456(f)(1) of the Act, the Authority’s board of directors is empowered to establish a nine-member Board of Review composed of two members each from the House Appropriations Committee, the House Public Works and Transportation Committee, the Senate Appropriations Committee, and the Senate Commerce, Science and Transportation Committee, as well as one additional member of the House or Senate. The board of directors appoints the members from lists provided by the Speaker of the House and the President *pro tempore* of the Senate.

The Board of Review members serve in their “individual capacities, as representatives of [the airports’] users.” 49 U.S.C. app. § 2456(f)(1); Bylaw Article IV, Section 1.

The mere fact that congressional leaders submit lists of proposed Board candidates to the Authority does not, as the district court noted, raise constitutional concerns. See *Citizens for the Abatement of Aircraft Noise*, 718 F. Supp. at 984 & n.16. The Supreme Court has previously confronted such limited lists without suggesting that they violate separation of powers principles. See *Bowsher*, 478 U.S. at 727 (President nominates Comptroller General from list of three individuals recommended by Speaker of the House and President *pro tempore* of the Senate); *Mistrutta*, 488 U.S. at 368, 410 n.31 (Judicial Conference submits list of six judges, from which President appoints at least three to the Sentencing Commission).

Instead, what troubles the majority is the Board’s composition. The court essentially holds that, because Board members also serve on congressional committees “directly concerned with the formulation of . . . policies affecting commercial aviation,” their decisions with respect to the Authority will be dictated by congressional goals and interests. See Maj. Op. at 16-17. I disagree with the court’s assertion that members of congressional transportation and appropriations committees may not constitutionally serve in their individual capacities as representatives of airport users. In *Mistrutta*, the Supreme Court found no absolute constitutional prohibition against federal judges serving as members of the United States Sentencing Commission, a body alleged to exercise legislative authority through its promulgation of sentencing guidelines. See 488 U.S. at 383-84, 404. The Court’s analysis of the judges’ dual responsibilities is particularly illuminating:

The judges serve the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by

the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. . . . [T]he judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission.

*Mistretta*, 488 U.S. at 404. The Court's reasoning in *Mistretta* is directly applicable here to the Board of Review: members of Congress, particularly qualified on the subjects of commercial aviation and institutional operations, serve in an individual administrative—not legislative—capacity when they review the Authority's actions.

It is gratuitous to assume that committee membership automatically leads to congressional control. We should not presume that Board members will tailor their decision-making to congressional desires when there is no statutory requirement that Board members consult with any committee of Congress, or that the Board's actions be subject to any kind of congressional oversight. The Board of Review's appointment process simply violates no constitutional separation of powers principles heretofore articulated.

#### B. Removal Power

As the court itself recognizes, locating removal power is central to separation of powers analysis. *See Bowsher*, 478 U.S. at 727 (“The critical factor [in determining that the Comptroller General is subservient to Congress] lies in the provisions of the statute . . . relating to removability.”); Maj. Op. at 17. In *Bowsher*, a federal statute provided that the Comptroller General could be removed for a variety of causes, but only through congressional impeachment or resolution. Here, by contrast, the federal Act and the Authority's bylaws are silent as to removal procedures for Board of Review members. De-

spite the absence of a factual predicate, the court nevertheless analogizes this case to *Bowsher*. It notes that the Board is composed of members of specified congressional committees, and concludes that Congress effectively exercises removal power over the Board through its ability to “remove any of its members from any committee at any time.” Maj. Op. at 17. I believe that this interpretation is seriously flawed.

First, the court relies heavily on language from *Bowsher* stating that constitutionality cannot turn on judicial assessments of whether an officer “is on good terms with Congress”; the court also quotes *Bowsher*'s conclusion that “the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.” Maj. Op. at 17 (quoting *Bowsher*, 478 U.S. at 730). The clear import of the court's quotation is that the Board members stand in the same “subservient” relationship to Congress as the Comptroller General in *Bowsher*. As noted above, however, the relevant statutory schemes are strikingly different: whereas Congress was authorized to remove the Comptroller General by a variety of methods and for a variety of causes, the Airports Act vests no removal power in Congress whatsoever. In the quoted excerpt from *Bowsher*, Chief Justice Burger was simply responding to the dissent's argument that Congress was unlikely ever to *exercise* its (clearly possessed) removal power; he did not have before him a situation, like this, where the very locus of the removal power was a matter of dispute. Thus, the court's citation of *Bowsher* is both misleading and analytically unsound.

Second, I disagree with the court's analysis of the removal power. As the district court noted, well-established rules of statutory construction suggest that, “‘absent a specific provision to the contrary, the power of removal from office is incident to the power of appointment.’” *Citizens for the Abatement of Aircraft Noise*, 718 F. Supp. at 984 & n.14 (quoting *Carlucci*

*v. Doe*, 488 U.S. 93, 99 (1988) (internal quotation omitted)). Under this interpretation, the Authority's board of directors—not Congress—would possess removal power over the Board of Review. *See also* Metropolitan Washington Airports Authority Resolutions Nos. 87-12, 87-27 (establishing that “the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term”).

Third, the court’s interpretation is unpersuasive even on its own terms. The statute provides only that the Board of Review shall “consist” of members of the specified congressional committees. 49 U.S.C. app. § 2456(f) (1). In light of the *Ashwander* principle, cited above, that courts should construe statutes to avoid constitutional infirmities where possible, we should not read the Act to prohibit a Board member who serves on the appropriate committee at the time of her appointment and later leaves the committee—or even loses a bid for reelection—from serving out her full Board term. The fact that the standard term of service on the Board of Review is six years, *see* 49 U.S.C. app. § 2456(f) (2), thus spanning three Congresses, further supports the notion that a Board member’s tenure need not correlate with his or her congressional status.

#### IV.

I would affirm the district court’s grant of summary judgment for the Authority. Unlike the panel, I find no constitutional infirmities in the appointment process for Board members: *Bowsher* and *Mistretta* addressed similar procedures without invalidating them, and the mere fact that members of Congress serve on the Board in their individual capacities does not present a constitutionally adequate distinction. Nor do I find any problems with removal power over Board members: the statutory silence in this case is very different from the explicit authority possessed by Congress in *Bowsher*, and plausible alternative constructions exist under which removal power

rests with the Authority’s board of directors. The declaratory and injunctive relief the court today orders—preventing the Authority from taking any actions (such as bond issuances, or adoption of a budget or master plan) for which Board of Review approval is statutorily required—thwarts local control over and planning for the airports. I see no reason for this court to reach the drastic result of invalidating a delicately-balanced and innovative institution of federalism on separation of powers grounds when plausible—indeed more plausible—alternative interpretations would sustain the Board of Review as constitutional.

**APPENDIX B**

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7182

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,  
v. *Appellants,*

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Appellees,*  
UNITED STATES OF AMERICA,  
*Intervenor.*

BEFORE: Wald, Chief Judge; Mikva and Buckley,  
Circuit Judges

**ORDER**

[Filed Dec. 6, 1990]

Upon consideration of the Unopposed Motion of Appellees Metropolitan Washington Airports Authority, et al., for a Stay of Mandate and the Effective Date of Opinion and Order of this court Pending Petition for Writ of Certiorari, it is

ORDERED, by the Court, that the issuance of the mandate and effective date of the Court's Opinion and order dated October 26, 1990 are stayed for a period of seven days from the final disposition of any timely filed Petition for a Writ of Certiorari or a petition for rehearing and/or suggestion for rehearing *en banc* filed in this Court or to December 12, 1990, should none of such petitions or suggestion be filed.

*Per Curiam*  
FOR THE COURT:  
CONSTANCE L. DUPRE  
Clerk

By /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

**APPENDIX C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-3319

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,  
v. *Plaintiffs,*

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Defendants.*

**MEMORANDUM OPINION AND ORDER**

The Supreme Court's recent separation of powers jurisprudence has been populated by an array of novel situations. Within the last few years, the Court has upheld the constitutionality of a Sentencing Commission within the Judicial Branch composed of judges and others appointed by the President and charged with the duty of formulating guidelines for sentencing of federal offenders, *Mistretta v. United States*, 109 S. Ct. 647 (1989); has rejected a challenge to an independent counsel located within the Judicial Branch to investigate and prosecute crimes committed by Executive Branch officials, *Morrison v. Olson*, 108 S. Ct. 2597 (1988); and has approved a law allowing a federal agency to adjudicate state law counterclaims arising in connection with administrative proceedings, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

This case features yet another unusual institution. In transferring two federally-owned airports to an interstate authority, Congress required that the lease describ-

ing the transfer provide for a review board composed of nine members of Congress with veto power over the state authority. The compacting states agreed to this condition and created the review board. The Court is now called upon to determine whether the federal statute authorizing the transfer of the airports violates the Constitution. For the reasons articulated below, the Court concludes that it does not.

### I. Background

Three major commercial airports serve the Washington, D.C. area. The oldest is Washington National Airport (National), which was opened in 1941 just across the Potomac River from the District of Columbia in Virginia. Baltimore-Washington International Airport (BWI), formerly known as Baltimore Friendship Airport, is situated halfway between the District of Columbia and Baltimore, Maryland in the Maryland suburbs. Washington Dulles International Airport (Dulles), located in the suburbs of Virginia, began operations in 1962. Although every other commercial airport in the United States is operated by a regional, state or local authority, National and Dulles were placed under the ownership and control of the federal government.<sup>1</sup> The Federal Aviation Administration (FAA), a component of the Department of Transportation, undertook this responsibility.

Ever since the two airports opened, plans to extricate National and Dulles from federal control have surfaced. None succeeded. In June 1984, however, the combination of rising federal budget deficits and the need for immediate and significant improvements of the facilities at National and Dulles led Secretary of Transportation Elizabeth Dole to form an advisory commission composed of public leaders and aviation officials to explore the transfer issue. On December 18, 1984, the Holton Commis-

<sup>1</sup> BWI, for example, is owned by the State of Maryland.

sion, named after its Chairman, former Virginia Governor A. Linwood Holton, Jr., issued a report whose main recommendations were (1) that National and Dulles be transferred to a single independent public authority with the ability to issue tax-exempt bonds to raise revenue for capital improvements; (2) that the transfer should be effected by means of a long term lease; and (3) that the new entity should be administered by a governing board made up of non-political members appointed by local officials. See Plaintiffs' Exhibit (Pl. Ex.) 2.

The momentum generated by the Holton Commission's report spurred legislative activity on two fronts. On April 3, 1985 the Governor of Virginia approved a law authorizing creation of a regional airports authority along the lines suggested by the Holton Commission to acquire National and Dulles from the federal government. 1985 Va. Acts ch. 598. Almost-identical legislation was passed by the City Council of the District of Columbia; it was signed by the Mayor on October 9, 1985 and became effective on December 3, 1985. D.C. Law 6-67 (1985). In the meantime, the Congress was also taking action. A bill was introduced in the Senate on April 26, 1985 conveying the Reagan Administration's proposal for transferring National and Dulles. See 131 Cong. Rec. 9607 *et seq.* Hearings were held before the Senate Committee on Commerce, Science and Transportation in June and July of 1985, and the version of the bill that was approved by the committee embodied the recommendations of the Holton Commission "[i]n all significant respects." S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The measure was debated in, amended by and passed the full Senate on April 11, 1986. 132 Cong. Rec. 7276.

The focus then shifted to the House, where the Committee on Public Works and Transportation held its own hearings in June 1986. Shortly thereafter, however, the Department of Transportation sought guidance from the

Justice Department concerning several proposals to create a board, whose members would be drawn from the House and Senate, with veto power over certain decisions of the airports authority. The Assistant Attorney General for Legislative and Governmental Affairs, John R. Bolton, issued a letter opinion discussing the alternatives and concluding that one of the three was constitutional. Pl. Ex. 3. A new bill, now containing a provision for a Congressional review board, passed the Senate on October 3, 1986 and the House on October 15, 1986 as part of an appropriations rider. See 132 Cong. Rec. S14,862-64 & H11098-106 (daily ed.). After being signed by the President, the Metropolitan Washington Airports Act of 1986 (the Airports Act or the Act) became law.<sup>2</sup>

## II. The Airports Act

Concluding that National and Dulles "constitute an important and growing part of the commerce, transportation, and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region" and that the federal government had a "continuing but limited interest" in the two airports, § 2451(1) & (3), Congress passed the Airports Act to

authorize the transfer of operating responsibility under long-term lease of the two [airports] as a unit . . . to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets.

§ 2452(a). To that end, the Act authorizes the Secretary of Transportation to enter into a 50-year lease for the

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<sup>2</sup> Pub. L. No. 99-500, 100 Stat. 1783-373, reenacted in Pub. L. No. 99-591, 100 Stat. 3341-376. For simplicity, references to specific provisions of the Act, which is codified at 49 U.S.C. app. §§ 2451-2461, will be cited as "§ —" or "section —."

transfer of the airports to the aforementioned Airports Authority and states that the lease "shall provide" for the payment of \$3 million per year from the Authority to the United States Treasury. § 2454(a) & (b).<sup>3</sup> In addition, the Act provides that the Airports Authority "shall agree, at a minimum" to certain "terms and requirements" contained in the lease. § 2454(c). Among other things, the Authority is required to operate National and Dulles "as a unit," to use the property only for airport purposes, to adhere (with certain exceptions) to all applicable FAA regulations, and to assume all rights, liabilities and obligations of National and Dulles. *Id.*

Section 2456 of the Act is entitled "Airports Authority," and its provisions lie at the heart of the instant case. The section begins:

The Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia . . . but at a minimum meeting the requirements of this section.

§ 2456(a).<sup>4</sup> It provides that the Airports Authority shall be (1) "independent" of Virginia, the District of Columbia and the federal government and (2) "a political subdivision constituted solely to operate and improve both [National and Dulles] as primary airports serving the Metropolitan Washington area." § 2456(b). In section 2456(c), the Authority is granted general authority to operate and is empowered to "acquire, maintain, improve, operate, protect, and promote" the two airports; to issue bonds; to acquire real and personal property; to

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<sup>3</sup> The Act also allows for extension of the term of the lease. § 2459.

<sup>4</sup> In another section, the Act permits the State of Maryland to enter an agreement to include BWI in the Authority. § 2452(b).

levy fees or other charges; and to make agreements with employee organizations. Whenever the Authority takes an action "changing, or having the effect of changing, the hours of operation of or types of aircraft serving either of the [airports]," it must do so by regulation. § 2456(g).

The Authority is administered by an 11-member Board of Directors. § 2456(e)(1). Five are appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President with the advice and consent of the Senate. *Id.* Members (who serve staggered, six-year terms) are prohibited from holding elective or appointed office, may not receive compensation for their service, and must (with the exception of the member appointed by the President) reside within the Washington Standard Metropolitan Statistical Area. § 2456(e)(2) & (3). The Chairman is chosen by majority vote of all members. § 2456(e)(1).

The Act also provides that the Board of Directors "shall be subject to review of its actions and to requests" by a Board of Review, which "shall be established by the Board of Directors." § 2456(f)(1). The Board of Review consists of (1) two members from both the House Committee on Public Works and Transportation and the Committee on Appropriations, chosen from a list provided by the Speaker of the House; (2) two members from both the Senate Committee on Commerce, Science and Transportation and the Committee on Appropriations, from a list provided by the President *pro tempore* of the Senate; and (3) one member from the House of Representatives and Senate as a whole, from lists provided by the Speaker and the President *pro tem.* *Id.* Members from the Congressional committee serve staggered, six-year terms, while the "at large" member (whose seat alternates between the House and the Senate) serves a two-year term. § 2456(f)(2). No Senator or Represen-

tative from Virginia or Maryland, nor the delegate from the District of Columbia, may serve on the Board of Review. § 2456(f)(1). The Act states that the members serve "in their individual capacities, as representatives of users of [National and Dulles]." *Id.*

The Airports Act also describes the parameters of the relationship between the Board of Review and the Board of Directors. Whenever, for example, the Board of Directors seeks to adopt a budget, issue bonds, adopt, amend or repeal a regulation, adopt or revise a master plan, or appoint a chief executive officer, it must submit that action for approval by the Board of Review. § 2456(f)(4).<sup>5</sup> In addition, Board of Review members may participate as nonvoting members in meetings of the Board of Directors and may request the Authority to vote or report on any matter related to the airports. § 2456(f)(5) & (6). Finally, the Act states that, if the ~~Board~~ of Review "is unable to carry out its functions under this subchapter by reason of a judicial order," the Board of Directors "shall have no authority to perform" any of the five actions that they are required to submit to the Board of Review for approval. See § 2456(h).<sup>6</sup>

### III. Developments Since Passage of the Act

The Secretary of Transportation and the Airports Authority entered into a lease for the transfer of National and Dulles on March 2, 1987, *see* Defendants' Exhibit (Def. Ex.) 3, and the Authority adopted by-laws to gov-

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<sup>5</sup> If the Board of Review does not disapprove the action within 30 days, it takes effect; if an action is disapproved, the Board of Review must state the reasons for its decision. *Id.*

<sup>6</sup> The Act also contains a separability provision:

Except as provided in section 2456(h) of this title, if any provision of this subchapter or the application thereof to any person or circumstance, is held invalid, the remainder of this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

ern its operations two days later. Def. Ex. 4. Thereafter, Virginia and the District of Columbia enacted laws, on April 8, 1987 and June 1, 1987 respectively, amending the legislation that they originally passed authorizing the Airports Authority. *See* 1987 Va. Acts ch. 665; D.C. Law 7-18 (1987). On June 3 and September 2, 1987, the Board of Directors selected the members of the Board of Review from lists provided by the Speaker of the House and the President *pro tem* of the Senate. *See* Pl. Exs. 9 & 10.<sup>7</sup>

The Authority proposed a Master Plan for the renovation of National and Dulles in October 1987. After receiving comments from the public, *see, e.g.*, Pl. Ex. 17, the Board of Directors adopted a resolution approving the Plan on March 13, 1988. Def. Ex. 7. At a regular meeting held on April 13, 1988, the Board of Review discussed the Plan and voted not to disapprove it. Pl. Ex. 18. The Authority has begun to implement the Plan since that time.

#### IV. The Instant Case

This lawsuit was filed on November 16, 1988. Plaintiffs are the Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), and two of its members, John W. Hechinger, Sr. and Craig H. Baab. A non-profit organization of citizens and groups, CAAN seeks to achieve "balanced service at the [Washington, D.C.] area's three airports" and to "reduce aircraft operations at Washington National Airport, and alleviate the noise, safety problems and air pollution that result from such operations." Complaint ¶ 3. Naming the Airports Authority and the Board of Review as defendants, plaintiffs contend that the power of the Board of Review found in section 2456 (f) (4) to disapprove actions of the Authority violates

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<sup>7</sup> The House members are William Lehman, Silvio O. Conte, John Paul Hammerschmidt, Norman Y. Mineta and Dan Rostenkowski; the Senate members are Robert C. Byrd, Nancy L. Kassebaum, Ted Stevens and Ernest F. Hollings. *Id.*

the bicameralism requirement of Article I, §§ 1 and 7 of the Constitution, the Presentment Clauses of Article I, § 7, clauses 2 and 3, and the doctrine of separation of powers. Complaint ¶ 22. Plaintiffs seek a declaratory judgment and injunctive relief enjoining the Board of Review from taking any actions under the Act and forbidding the Airports Authority from taking any action (including implementation of the Master Plan) that it ordinarily would submit for approval of the Board of Review. *Id.* at 9. Defendants filed their answer to the complaint on December 16, 1988; cross-motions for summary judgment followed.<sup>8</sup>

#### V. Discussion

##### A. Threshold Arguments

Defendants maintain that this case should be dismissed for lack of jurisdiction because plaintiffs' lawsuit is not ripe for judicial review, because plaintiffs have failed to exhaust their administrative remedies and because plaintiffs lack standing to assert their claims. None of these arguments has merit.

Defendants' first two contentions warrant little discussion. With respect to ripeness, they note that, although plaintiffs allege in this suit that the Board of Review's veto power over the Authority is unconstitutional, the Board of Review has never exercised its power to plaintiffs' detriment. Defendants therefore argue that "there is no confrontation requiring judicial intervention" and that plaintiffs' case "lacks the concreteness necessary to establish ripeness" because it rests on speculation that the Board of Review may one day veto an action of the Authority and cause them harm. Motion for Summary Judgment at 13. The Court must disagree. While the Board of Review has not disapproved an action to plain-

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<sup>8</sup> The parties are to be commended for the high caliber of the briefs that they have submitted.

tiffs' detriment, that does not preclude a showing of ripeness. To the contrary, this case is as ripe as it ever will be. Congress has passed a law establishing an Airports Authority and a Board of Review. Plaintiffs maintain that one aspect of the law—the veto power wielded by the Board of Review over the Authority—violates several provisions of the Constitution. Defendants nowhere suggest, nor can the Court discern, how the particular manner in which the veto power is exercised will affect the constitutionality *vel non* of the body that exercises it.<sup>9</sup> This is also not a situation where the possibility of a veto is abstract or ephemeral, for the Board of Review has already acted to disapprove one resolution passed by the Board of Directors. *See Pl. Ex. 11.*

Citing *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *McKart v. United*

<sup>9</sup> Because plaintiffs challenge one discrete provision of the Airports Act, this is not a case like *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1101 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986), in which the court was asked "to pass on the constitutionality of an entire Act of Congress that vests in an entity a host powers." Nor, given that Congress has already enacted the veto provision under attack, is this a case like *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 512 (1984), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018-19 (1984), or *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984), all of which involved potential conflicts that could have been avoided. Finally, defendants' emphasis on "concreteness" is misplaced, since (as their own cases make clear) that requirement arises under the law of standing, not under the ripeness doctrine. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982) (concreteness arises from "proceedings commenced by one who has been injured in fact"; plaintiffs lacked standing because they had not alleged an *injury of any kind*) (emphasis in original); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues'") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

*States*, 395 U.S. 185 (1969), defendants next assert that plaintiffs have failed to exhaust their administrative remedies because plaintiffs are participants in an ongoing study of noise problems being conducted by the Authority and will be able to comment on any recommendations that are proposed. Motion at 16 n.12. The cases cited by defendants are inapposite, however. In *Williamson*, a land-owner alleged that a local zoning law amounted to an unconstitutional taking of property under the Fifth Amendment but had not obtained a final decision that he would not receive a variance. The Supreme Court held that exhaustion was necessary because of "the very nature of the inquiry required by the Just Compensation Clause"—an inquiry examining "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." 473 U.S. at 190-91. The instant case requires none of those fact-bound determinations. *McKart* is even weaker authority, for there the Court rejected the government's claim that the exhaustion doctrine barred a *criminal* defendant from presenting a defense that he did not raise in the administrative context. 395 U.S. at 196-97. But even were exhaustion appropriate, defendants' claim that the noise study is "specifically designed to address the alleged injuries of which [plaintiffs] complain," Motion at 16 n.12, is only partially correct. While plaintiffs are concerned with reducing noise at National and Dulles, they also contend that the exclusion of local representatives from the Board of Review "has diminished the influence that CAAN and its members have over decisions concerning the operation of the airports." Complaint ¶ 21. The ongoing noise study could not, of course, address that claim.

The matter of standing is a closer question. The federal judicial power is limited to "cases" and "controversies" arising under the Constitution and laws of the United States. Article III, § 1. In its most basic form,

the doctrine of standing asks "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Aside from certain prudential limitations, a party seeking to litigate in federal court must, at a constitutional minimum, allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Although defendants argue that plaintiffs have satisfied neither of these requirements, the Court must disagree.

As noted above, CAAN is primarily concerned with the adverse effects of operations at National Airport. As one of its members explains:

4. Most of CAAN's members live under the flight path going to and from National Airport. They are also adversely affected by the traffic congestion resulting from passenger activity at that airport. Some have developed health problems that they attribute to the air traffic, and others' property values have suffered as a result of their proximity to the airport or its flight path.

5. CAAN's members generally favor a nighttime curfew on air traffic and reduction in the level of daytime air traffic at National Airport, accompanied by an expansion of air services available at Dulles [and BWI].

6. The Airports Authority's Master Plan for National Airport will injure CAAN's members further because it proposes to expand the airport's facilities, to build them to accommodate wide-bodied jets, to increase passenger levels, and to increase air carrier traffic by utilizing currently unused slots.

Affidavit of Sherwin Landfield, Pl. Ex. 13, ¶¶ 4-6. Defendants maintain, however, that plaintiffs' injuries are

not caused by the Master Plan. They assert that the Plan is a "noise neutral" map for the renovation of National which does not contemplate the building of any new runways, gates or terminals. According to defendants, decisions about the number and type of aircraft using National, the amount of passengers carried, and the precise landing and takeoff patterns are made by the FAA, the airline companies and the marketplace but *not* by the Master Plan. That may be so, but the Plan contains other features. A taxiway turnoff will be added "[t]o reduce aircraft time on the runway and thus improve capacity." Pl. Ex. 16 at 10. The airports' gates will be remodeled to accommodate new "widebody" airplanes. Affidavit of James A. Wilding, Def. Ex. 8, ¶ 6. And the size of existing terminals and available parking spaces would be almost doubled. Pl. Ex. 16 at 5. Thus, while defendants are correct in stating that the Plan itself will not *cause* an expansion in air traffic at National, it is also true that an increase in both passengers and flights could *not* occur without the significant improvements contemplated by the Plan. Moreover, forecasts prepared for the Master Plan recognize that an increase in flights and passengers will in fact take place, *see* Pl. Exs. 16 at 2; 24 at 12; 25 at II-12. Because defendants nowhere challenge plaintiffs' contention that they are harmed by noise, air pollution and the safety problems associated with flights to and from National, and because the Master Plan will facilitate increased air travel to the airport, their alleged injuries are "fairly traceable" to the Master Plan.

Defendants also assert that granting plaintiffs the relief they seek—an injunction barring implementation of the Plan and precluding the Authority from taking any actions that it would normally submit to the Board of Review for approval—would not redress their injuries because the Authority would be then unable to take any action to remedy the noise situation at National. But if

the Authority may not issue bonds or adopt a budget, continued construction at National would cease, the additional capacity otherwise possible would be halted, and plaintiffs' asserted injuries would be averted. Plaintiffs therefore meet both aspects of the standing inquiry.

Plaintiffs have standing for yet another reason. As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.” In addition to their concerns regarding air traffic at National, plaintiffs also contend that the veto power of the Board of Review “diminished the influence” of CAAN over airports issues because no local Congressmen or Senators may be selected for the Board. Complaint ¶ 21. A similar claim was recognized in *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983). There, an organization devoted to hunger issues and two low-income individuals brought suit contending that a presidential commission had failed to comply with the Federal Advisory Committee Act’s requirement that its membership be “fairly balanced.” The district court found that plaintiffs had standing, and the court of appeals noted that “[t]he standing question is a close one that we need not resolve to decide this appeal, but we are inclined to agree with the District Court’s conclusion.” 711 F.2d at 1073-74. In a footnote explaining its “inclination to agree,” the court observed that FACA

confers no cognizable personal right to an advisory committee appointment. But, [as] the legislative history makes clear, the “fairly balanced” requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on

the committee. When the requirement is ignored, therefore, persons having a direct interest in the committee’s purpose suffer injury-in-fact sufficient to confer standing to sue.

*Id.* at 1074 n.2 (citations omitted). Defendants correctly observe that this case does not arise under FACA and that the Airports Act does not contain a “fairly balanced” requirement. The Act does make plain, however, that the Authority was created in part to protect the interests of local residents such as the members of CAAN.<sup>10</sup> Although the Board of Directors contains local representatives, the Board of Review does not. § 2456 (f)(1). If, therefore, the Board of Review is unconstitutional, the veto power it possesses would dilute the local interests’ representation mandated by the Act. Plaintiffs therefore have standing under the Act to assert this additional injury.

## B. The Merits

1. The Framers of our Constitution “knew that ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointive or elective, may justly be pronounced the very definition of tyranny.’” *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859-60 (1986) (Brennan, J., dissenting) (quoting *The Federalist*, No. 46 at 334 (H. Dawson ed. 1876) (J. Madison)). That document accordingly divides the powers of the National Government into three coordinate spheres: Legislative, Executive and

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<sup>10</sup> The Act states that “any change in status of the two airports must take into account the interest of nearby communities . . . and other interested groups,” recognizes the “limited need for a Federal role . . . and the growing local interest,” and notes that the Authority “will improve communications with local officials and concerned residents regarding noise” at National and Dulles. § 2451(6), (7) & (8).

Judicial.<sup>11</sup> This system "was deliberately structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). In the now-famous words of Justice Jackson, the tripartite arrangement seeks to "diffuse[] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The Supreme Court has developed a number of constitutional guides to preserve and maintain the independence of the Branches, and plaintiffs assert that two are implicated here. The most familiar is the doctrine of separation of powers, which in its fundamental formulation requires that "in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). Plaintiffs contend that the Airports Act transgresses this mandate because the Board of Review, which is composed entirely of members of Congress, reviews decisions by the Board of Directors involving the issuance of regulations, the adoption of the Master Plan and the formation of budget plans. In their view, the Act violates the proscription noted by the Supreme Court in *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), that "the legislature cannot engraft executive duties upon a legislative office." *Id.* at 202.

The Supreme Court has also made clear that "the legislative power of the Federal Government [must] be

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<sup>11</sup> Article I, Section 1 provides that "[a]ll legislative Powers shall be vested in a Congress of the United States." Article II, Section 1 states that "[t]he executive Power shall be vested in a President of the United States." And Article III, Section 1 holds that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983). This procedure is contained in the Bicameralism requirement, which mandates that all bills "shall have passed the House of Representatives and the Senate," Art. I, § 7, cl. 2, and the Presentment Clauses, which provide that thereafter all bills, orders and resolutions "shall be presented to the President of the United States." *Id.* cl. 2 & 3. In *Chadha*, the Supreme Court described these provisions as an "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process," 462 U.S. at 959, which must be adhered to whenever Congress engages in "an exercise of legislative power." *Id.* at 952.<sup>12</sup> Plaintiffs maintain that the veto power possessed by the Board of Review amounts to "an extra-constitutional check on the execution of the law" in violation of *Chadha*. Motion at 23.

Before assessing the validity of these arguments, the Court pauses to note the gravity of this undertaking. As Justice Stevens has observed, "[w]hen [a court] is called upon to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President . . . it should only do so for the most compelling constitutional reasons." *Bowsher*, 478 U.S. at 736 (Stevens, J., concurring). There accordingly exists a "presumption that the challenged statute is valid," *Chadha*, 462 U.S. at 944, as well as an understanding that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). These devices ensure that "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp

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<sup>12</sup> The Court struck down a law which allowed either House of Congress to invalidate a decision by the Attorney General that a deportable alien should be allowed to remain in the United States. 462 U.S. at 952-59.

power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S. Ct. 1392, 1397 (1988). With these standards in mind, and having considered the arguments presented by the parties, the Court finds that the veto power of the Board of Review is constitutional.

Plaintiffs' arguments rest on two fundamental premises. One is their view that the Board of Review is a legislative office under the control and direction of Congress. Plaintiffs state, for example, that in creating the Board of Review Congress "retained the power to veto the [Airports] Authority's major actions." Motion at 23. They describe the Board as "an arm" and as "an agent" of Congress. *Id.* at 26. Plaintiffs' other assumption is that the creation of the Board of Review was compelled by passage of the Airports Act. They assert that "the Board is mandated by federal law," Reply Brief at 2, and contend that the Airports Authority was "directed by statute and lease to establish a congressional Board of Review." *Id.* at 6. Neither of plaintiffs' theories is well-founded, however.

Our examination begins, as it must, with the language of the Airports Act. The statute provides that the Airports Authority is "independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government." § 2456(b)(1). It further states that the Board of Review must consist of Congressmen acting "in their individual capacities, as representatives of users of [National and Dulles]." § 2456(f)(1).<sup>13</sup> These words, which are clear and unequivocal, emphasize the Board's independence: it is not beholden to Congress. Invoking a familiar rule of construction, defendants suggest that the plain meaning of the Act should

<sup>13</sup> The independence of the Board is also reiterated in the Authority's Bylaws as well as the lease it negotiated with the Department of Transportation. See Def. Ex. 3, art. 13.A, and Def. Ex. 4, art. IV, § 1.

govern and further investigation cease. The cases on which they rely involve differing interpretations of *statutory* provisions. In the constitutional context the Supreme Court has cautioned that "separation-of-powers analysis does not turn on the labelling of an activity," *Mistretta v. United States*, 109 S. Ct. 647, 665 (1989), but rather "focuse[s] on the 'unique aspects of the congressional plan at issue and its practical consequences.'" *Id.* (citing *Schor*, 478 U.S. at 857 (1986)). The inquiry therefore continues.

The structure of the Airports Act also discloses the independence of the Board of Review. Although the Board of Review is composed of members of Congress, Congress does not appoint them. Rather, the Board of Directors of the Airports Authority—a group selected by local leaders (except for one Presidential appointee)—establishes the Board of Review. § 2456(f)(1). Moreover, Congress may not remove any of the members of the Board of Review. The statute is silent on this point and, in accord with well-recognized principles of both federal and state law,<sup>14</sup> that silence indicates that the body which appointed the members of the Board of Review (in this case, the Board of Directors) retains the power to remove them.<sup>15</sup> This power of removal is significant for, in concluding that the Comptroller General was "subservient to Congress" in *Bowsher*, the Supreme Court observed that "[t]he critical factor" was the provision allowing for his removal by Congress. 478 U.S. at 727. In addition, it bears repeating that the Board of Review is just that—a review body. Although it can request a vote or study

<sup>14</sup> See *Carlucci v. Doe*, 109 S. Ct. 407, 411 (1988); Va. Code § 24.1-79.6.

<sup>15</sup> The resolutions passed by the Board of Directors appointing the members of the Board of Review reflect this power; they state that "the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term." Pl. Exs. 9 & 10.

by the Board of Directors, § 2456(f)(5), the Board of Review only possesses disapproval power and cannot compel the Airports Authority to take any particular action. Finally, members of the Board of Review do not receive any additional compensation beyond their Congressional salaries, are not required to report to Congress about their activities, and are not granted any fixed budget by the Act.

Plaintiffs' arguments to the contrary are unpersuasive. They initially contend that Congressional control is evident because the Board of Review has held all of its meetings on Capitol Hill and because members have responded to inquiries from the public about the Board using official Congressional stationary. But these activities do not show control in the constitutional sense of either the power to appoint or the power to remove but rather simply reflect the fact that all of the members of the Board of Review are also members of Congress. As the Supreme Court has noted in a different context, the Constitution "does not forbid [Congressmen] from wearing two hats; it merely forbids them from wearing both hats at the same time." *Mistretta*, 109 S. Ct. at 671. Plaintiffs next maintain that the Board of Directors' appointment power is illusory (and Congressional control evident) because the Board of Directors must make its appointments to the Board of Review from lists provided by the Speaker of the House and the President *pro tem* of the Senate and because eight of the nine members must come from committees with oversight over airport matters. In both *Bowsher* and *Mistretta*, however, the Supreme Court expressed no qualms about similarly-limited lists that were provided to the President for appointment purposes.<sup>16</sup> In addition, plaintiffs' protestations

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<sup>16</sup> See 478 U.S. at 727 (Comptroller General appointed from list of three provided by Speaker and president *pro tem*); 109 S. Ct. at 674 n.31 (Judicial Conference submits names of six judges for three appointments to Sentencing Commission).

notwithstanding, there is nothing unseemly about the requirement that most of the members of the Board of Review come from committees with jurisdiction over aviation issues, in view of their familiarity (and possible expertise) with the types of problems likely to confront all users of National and Dulles.<sup>17</sup> And it should also be reiterated that the Board of Directors' appointment power is not illusory, for it is free under the Act to reject a candidate submitted for the Board of Review if the nominee is deemed unsuitable for some reason.<sup>18</sup> Plaintiffs' argument with respect to the Authority's appointment power is unpersuasive. Finally, plaintiffs claim that certain statements made during floor debate on the Airports Act establish that the true purpose of the Board of Review was perpetuation of Congressional control, not advancement of user interests. Although numerous statements of Congressional "control" were, in fact, voiced,<sup>19</sup> plaintiffs' contention is rejected. For one thing, the Supreme Court has cautioned that the views of individual legislators should not be accorded significant weight in attempting to divine Congressional intent. *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982).<sup>20</sup> Moreover, contrary

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<sup>17</sup> The Court is not troubled by the fact that local members of Congress may not serve on the Board of Review. The Act specifically directs that local interests be taken into account in airport decisions, *see supra* note 10, and each of the Board of Directors (with one exception) is appointed by local officials.

<sup>18</sup> Plaintiffs' baldly assert that the members of the Board of Review were "preselected," Reply at 6, but there is no support in the record for this claim.

<sup>19</sup> See 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986) (the bill "provides for congressional control over both airports") (statement of Rep. Coughlin); *id.* at H11,100 ("The beauty of the deal is that Congress retains its control without spending a dime"); *id.* at H11,105 (the bill "does not give up congressional control and oversight—that remains in a Congressional Board of Review") (statement of Rep. Conte).

<sup>20</sup> Because the statements cited were made by supporters of the legislation in an eleventh-hour debate (the Airports Act was passed

to plaintiffs' claim that the "entire legislative history" supports their position, Motion at 25, other statements indicating concern for nationwide users of National and Dulles were also made.<sup>21</sup> And, as noted above, the Act specifically states that the Board of Review is an "independent" body, and Congress may neither appoint nor remove its members. In view of these significant countervailing considerations, the statements of "control" simply do not suffice to demonstrate that the Board of Review is an "agent" or an "arm" of the Congress for separation of powers purposes.<sup>22</sup>

Even less persuasive is plaintiffs' position that the Board of Review is somehow "mandated" by the Airports

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as part of an appropriations bill), it is not surprising that expressions of Congressional control might be emphasized to secure passage of the legislation.

<sup>21</sup> Representative Hammerschmidt, later appointed to the Board of Review, stated that it was "created to protect the interests of users of the two airports." 132 Cong. Rec. H11,106 (daily ed. Oct. 15, 1986). A Representative from Maryland who supported the Act observed that the Board "has been established to make sure that the Nation's interest, the congressional interest was attended to in the consideration of how these airports are operated." *Id.* at H11,103 (statement of Rep. Hoyer). And in her testimony at hearings held on the legislation, Secretary Dole emphatically noted that "Members of Congress are heavy users of the air transportation system." *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986).

<sup>22</sup> Plaintiffs also cite the three options for the Board of Review considered in August 1986 and argue that Congressional control is evident because two of those options would have created an oversight board appointed directly by Congress. See Pl. Ex. 3. But this contention proves too much. The Department of Justice rendered its opinion that these options were unconstitutional, *id.*, and Congress voted the third method (which the Justice Department had approved) for inclusion in the Act. If anything, that scenario demonstrates that Congress was sensitive to the constitutional ramifications of its actions.

Act. The Act does not establish any entity, federal or otherwise. Rather, it states that the airports are to be transferred "to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia," § 2452(a), authorizes the Secretary of Transportation to enter into a lease for National and Dulles, § 2454(a), and establishes certain conditions—including the makeup and powers of the Board of Review—that must be contained within the lease. §§ 2454 & 2456. Having being informed of these terms, Virginia and the District of Columbia freely agreed to enter into the lease with the federal government and passed legislation authorizing the establishment of the Airports Authority.<sup>23</sup> Those jurisdictions could have completely ignored the federal offer of a lease; but the fact that they accepted it does not mean that the Airports Act compelled them to do so. Indeed, had the legislatures of Virginia and the District of Columbia *not* enacted their enabling statutes, the Airports Authority would not have existed and the federal lease of National and Dulles could not have occurred. The Board of Review derives its existence from state law, not federal law.

Stripped of its conceptual underpinnings, plaintiffs' constitutional attack collapses. The separation of powers doctrine is violated only by those provisions of law "that either accrete to a single branch powers more appropriately diffused among separate branches or undermine the authority and independence of one or another coordinate branch." *Mistretta*, 109 S. Ct. at 659-70. See also *Morrison v. Olson*, 108 S. Ct. 2597, 2620 (1988). The Airports Act does neither. It does not improperly accrete any powers to Congress because Congress cannot force the Airports Authority to take any action and because the Board of Review possessing veto power is not under

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<sup>23</sup> Both state laws were passed almost one year *before* passage of the Airports Act, a fact that further undermines plaintiffs' assertion of Congressional influence.

the Congress's control. Nor does the Act undermine the Executive Branch in any way, since the activities of the Board of Review are carried out by an independent, local Airports Authority created under state law.<sup>24</sup> In short, because Congress exercises no federal power under the Act, it cannot overstep its constitutionally-designated bounds.

In addition, the separation of powers doctrine applies horizontally among the federal branches of the federal government, not vertically between the federal and state governments. *See Chadha*, 462 U.S. at 951 (recognizing “[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power”); *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977) (examining “the proper balance between the coordinate branches”); *Buckley*, 424 U.S. at 122 (doctrine is a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”).<sup>25</sup> But Congress took no action vis-a-vis the other branches in passing the Airports Act. Instead, it made an offer of a lease with certain conditions to Virginia and the District of Columbia, which accepted the offer and enacted legislation forming an interstate local entity to administer the Airports. This case is therefore unlike *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), where a territorial legislature removed voting power over stock in several national corporations from a co-equal branch (the Governor-General) and placed it in a Board

<sup>24</sup> Although the airports were formerly administered by the Department of Transportation, it was the Department that created a commission to determine the best way to sever its relationship with the airports, approached the Congress with a proposal for transferring National and Dulles, and obtained lease conditions to protect its interests.

<sup>25</sup> Plaintiffs describe this proposition as an “overly crabbed theory,” Reply at 8, but they suggest no authority to contravene the cases cited above.

that included members of the legislature. Nor is this case like *Bowsher*, in which the Comptroller General, an official removable by Congress, was charged with the interpretation of federal law. 478 U.S. at 732-33. The Airports Act did not place any powers in the Congress at the expense of the Executive Branch, but rather offered them with conditions to Virginia and the District of Columbia. The separation of powers argument must fail.

The Court also concludes that the Airports Act infringes neither the Presentment Clause nor the bicameralism requirement. The Supreme Court in *Chadha* struck down a one-House veto of an immigration decision of the Attorney General because it amounted to “an exercise of legislative power”—defined as “action that had the purpose and effect of altering the legal rights, duties, and relations of persons”—that was had to be taken by both Houses and presented to the President. 462 U.S. at 962. No exercise of legislative power is present in the Airports Act. The statute authorizes a federal agency to lease certain property and states that the lease should contain certain conditions. Without the consent of Virginia and the District of Columbia, the lease would not have been executed and the Authority and the Board of Review would not exist. *Chadha* concerns do not arise in the instant case.

2. The Court also rejects a trio of other constitutional claims asserted by plaintiffs. They first maintain that the Airports Act violates the Appointments Clause, Art. I, § 2, cl. 2, because the members of the Board of Review are “officers of the United States” who must be nominated by the President. The Appointments Clause is only implicated, however, when an individual “exercis[es] significant authority pursuant to the laws of the United States,” *Buckley*, 424 U.S. at 126, and the Board of Review derives its power from an interstate compact whose members are not considered officers of the United

States. *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987).<sup>26</sup> The Incompatibility and Ineligibility Clauses also do not apply. The former forbids a member of Congress from simultaneously "holding any Office under the United States," Art. I, § 6, cl. 2; the latter precludes a Congressman from being appointed to "any Office under the United States" if the office was created, or the emoluments increased, during his term as a Congressman. *Id.* But as noted above, the members of the Board of Review do not hold an "office of the United States" but serve on an interstate, local and independent Airports Authority.

## VI. Conclusion

In sum, the Board of Review is not an agent of Congress but owes its existence to an interstate compact between Virginia and the District of Columbia which signed a lease for the transfer of National and Dulles. The states are free to enter into such an interstate compact. The creation of the Authority and the Board of Review was not "mandated" by the Act, and this arm's-length transaction was entered into freely and willingly by all concerned. There is no question that Congress can dispose of federal property by lease and can attach conditions to its transfer, provided there is no constitutional bar to the transfer. See *South Dakota v. Dole*, 107 S. Ct. 2793 (1987).<sup>27</sup>

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<sup>26</sup> The Board of Review is authorized by the Authority's By-Laws and the lease with the federal government, and its powers are to be construed in accordance with Virginia law. Def. Ex. 3, art. 28. The Authority itself was, in turn, created by local legislation. State law, not federal law, governs its powers.

<sup>27</sup> *South Dakota* held that the Secretary of Transportation could constitutionally withhold 5% of highway funds from any state that did not adopt a minimum drinking age of 21 years old. Here, Congress did not threaten to withhold anything if Virginia and the

There is no doubt that the Board of Review is a unique institution. Novelty is not equivalent to unconstitutionality, however. *Mistretta*, 109 S. Ct. at 661 ("Our constitutional principles of separated powers are not violated . . . by mere anomaly or innovation"). In accordance with the Supreme Court's admonition that the separation of powers inquiry should be guided by "pragmatic, flexible approach," *Nixon*, 433 U.S. at 442, all aspects of the Airports Act and its history have been carefully examined. The Court concludes that the Act and the Board of Review that it authorizes do not violate the Constitution.

For these reasons, it is

ORDERED that plaintiffs' motion for summary judgment be and it hereby is denied; and it is

FURTHER ORDERED that defendants' motion for summary judgment be and it hereby is granted.

July 20, 1989

/s/ Joyce Hens Green  
JOYCE HENS GREEN  
United States District Judge

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District did not create an Airports Authority. Nor was the offer of the airports so overwhelmingly irresistible that Virginia and the District of Columbia had no alternative but to accept—they agreed to make substantial payments to the United States Treasury in return for the lease. § 2454(b).

**APPENDIX D**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 88-1022-LFO

FEDERAL FIREFIGHTERS ASSOCIATION, LOCAL 1, *et al.*,  
*Plaintiffs,*  
v.

THE UNITED STATES OF AMERICA, *et al.*,  
*Defendants.*

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MEMORANDUM  
[In Relevant Part]

[Filed Oct. 11, 1989]

A Memorandum filed March 30, 1989, addressed some of the differences between the parties with respect to the application of the Metropolitan Washington Airports Act ("Transfer Act") and a lease implementing that act. *See* 49 U.S.C. §§ 2451-61. That Memorandum and an accompanying Order authorized plaintiffs to amend their complaint to challenge the constitutionality and statutory legality of the composition of a Board of Review which includes several members of Congress and exercises a veto power over actions of the Metropolitan Washington Airports Authority's ("MWAA's") Board of Directors. In addition, plaintiff move for a summary judgment that numerous provisions of a Labor Code adopted by the Authority are not authorized by the Transfer Act: (1) the establishment of an Employee Relations Council to resolve certain employer-employee disputes; (2) judicial review of the Council's decisions in the

courts of Virginia; (3) provisions with respect to certain unfair labor practices; (4) an obligation on the union for so-called fair representation and financial disclosure to members; and (5) a provision precluding union security clauses in any contract. In addition, plaintiffs contend that the "no strike" provision considered in the March 30 Memorandum impinges on First Amendment rights to free speech.

I.

Plaintiffs challenge the constitutionality of the Labor Code because it was submitted to the Authority's Board of Review which includes members of Congress. Involvement of Congressmen, according to plaintiffs, violates separation of powers principles as well as the presentment clause and the requirement that Congress act only by vote of the House and Senate. *See* U.S. Const. art. 1, § 7. Defendants point out, however, that although the Code was presented to the Board of Review, it took no action so that plaintiffs suffered no injury and have no standing to challenge the composition of the Board. Moreover, even if there were a cognizable case or controversy here, the issue of constitutionality has been resolved at the district court level favorably to defendants by Judge Joyce Green's thorough opinion in *Citizens for the Abatement of Aircraft Noise v. MWAA*, Civil Action No. 88-3319 (D.D.C. July 20, 1989).

\* \* \* \* \*

Date: Oct. 11, 1989

/s/ Louis F. Oberdorfer  
United States District Judge

**APPENDIX E****CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES AND REGULATIONS INVOLVED****CONSTITUTION OF THE UNITED STATES****Article I, section 1:**

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**Article I, section 6, clause 2:**

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

**Article I, section 7, clause 2, in pertinent part:**

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

**Article I, section 7, clause 3:**

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

**Article II, section 1, in pertinent part:**

The executive Power shall be vested in a President of the United States of America.

**Article II, section 2, clause 2, in pertinent part:**

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

**Article IV, section 3, clause 2:**

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**STATUTES****SUBCHAPTER III—METROPOLITAN WASHINGTON AIRPORTS AUTHORITY****49 U.S.C. § 2451 (1988). Findings**

The Congress finds that—

(1) the two federally owned airports in the metropolitan area of Washington, District of Columbia, constitute an important and growing part of the commerce, transportation, and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region;

(2) Baltimore/Washington International Airport, owned and operated by the State of Maryland, is an air transportation facility that provides service to the greater Metropolitan Washington region together with the two federally owned airports, and timely Federal-aid grants to Baltimore/Washington International Airport will provide additional capacity to meet the growing air traffic needs and to compete with other airports on a fair basis;

(3) the Federal Government has a continuing but limited interest in the operation of the two federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

(4) operation of the Metropolitan Washington Airports by an independent local agency will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978 (Public Law 95-504; 92 Stat. 1705);

(5) all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level;

(6) any change in status of the two airports must take into account the interest of nearby communi-

ties, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the Federal Government and State governments involved;

(7) in recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary has recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the Nation;

(8) an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports;

(9) a commission of congressional, State, and local officials and aviation representatives has recommended to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by the Commonwealth of Virginia and the District of Columbia; and

(10) the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

(Pub.L. 99-500, Title VI, § 6002, Oct. 18, 1986, 100 Stat. 1783-373; Pub.L. 99-591, Title VI, § 6002, Oct. 30, 1986, 100 Stat. 3341-376.)

**§ 2452. Purpose****(a) In general**

It is therefore declared to be the purpose of the Congress in this subchapter to authorize the transfer of operating responsibility under long-term lease of the two

Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and the development of these important transportation assets.

**(b) Inclusion of BWI not precluded**

Nothing in this subchapter shall be construed to prohibit the Airports Authority and the State of Maryland from entering into an agreement whereby Baltimore/Washington International Airport may be made part of a regional airports authority, subject to terms and conditions agreed to by the Airports Authority, the Secretary, the Commonwealth of Virginia, the District of Columbia, and the State of Maryland.

(Pub.L. 99-500, Title VI, § 6003, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6003, Oct. 30, 1986, 100 Stat. 3341-377.)

**§ 2453. Definitions**

In this subchapter—

**(1) Administrator**

The term "Administrator" means the Administrator of the Federal Aviation Administration.

**(2) Airports Authority**

The term "Airports Authority" means the Metropolitan Washington Airports Authority, a public body to be created by the Commonwealth of Virginia and the District of Columbia consistent with the requirements of section 2456 of this title.

**(3) Employees**

The term "employees" means all permanent Federal Aviation Administration personnel employed on

the date the lease under section 2454 of this title takes effect by the Metropolitan Washington Airports, an organization within the Federal Aviation Administration.

**(4) Metropolitan Washington Airports**

The term "Metropolitan Washington Airports" means Washington National Airport and Washington Dulles International Airport.

**(5) Secretary**

The term "Secretary" means the Secretary of Transportation.

**(6) Washington Dulles International Airport**

The term "Washington Dulles International Airport" means the airport constructed under the Act entitled "An Act to authorize the construction, protection, operation, and maintenance of a public airport on or in the vicinity of the District of Columbia", approved September 7, 1950 (64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between the Interstate Routes I-495 and I-66.

**(7) Washington National Airport**

The term "Washington National Airport" means the airport described in the Act entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes", approved June 29, 1940 (54 Stat. 686).

(Pub.L. 99-500, Title VI, § 6004, Oct. 18, 1986, 100 Stat. 1783-374; Pub.L. 99-591, Title VI, § 6004, Oct. 30, 1986, 100 Stat. 3341-378.)

**§ 2454. Lease of Metropolitan Washington Airports**

**(a) Authority to enter into lease**

The Secretary is authorized to enter into a lease of the Metropolitan Washington Airports with the Airports Authority for a 50-year term and to enter into any related agreement necessary for the transfer of authority and property to the Airports Authority. Authority to enter into a lease and agreement under this section shall lapse two years after October 18, 1986.

**(b) Payments**

**(1) Lease payments**

The lease shall provide for the Airports Authority to pay to the general fund of the Treasury annually an amount, computed using the GNP Price Deflator, to equal \$3,000,000 in 1987 dollars. The Secretary and the Airports Authority may renegotiate the level of lease payments attributable to inflation costs every ten years.

**(2) Retirement obligations**

**(A) Discontinued service**

Not later than one year after the lease takes effect, the Airports Authority shall pay to the Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the actual added costs incurred by the Fund due to discontinued service retirement under section 8336(d)(1) of Title 5 of employees who elect not to transfer to the Airports Authority.

**(B) Unfunded liability**

Not later than one year after the lease takes effect, the Airports Authority shall pay to the

Treasury of the United States, to be deposited to the credit of the Civil Service Retirement and Disability Fund, an amount determined by the Office of Personnel Management to represent the present value of the difference between (i) the future cost of benefits payable from the Fund and due the employees covered under section 2457(e) of this title that are attributable to the period of employment following the date the lease takes effect, and (ii) the contributions made by the employees and the Airports Authority under section 2457(e) of this title. In determining the amount due, the Office of Personnel Management shall take into consideration the actual interest such amount can be expected to earn when invested in the Treasury of the United States.

**(c) Minimum terms and conditions**

The Airports Authority shall agree, at a minimum, to the following conditions and requirements in the lease:

**(1) Operation of airports as a unit**

The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

**(2) Airport purposes**

The real property constituting the Metropolitan Washington Airports shall, during the period of the lease, be used only for airport purposes. For the purposes of this paragraph, the term "airport purposes" means a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use

facilities. If the Secretary determines that any portion of the real property leased to the Airports Authority pursuant to this subchapter is used for other than airport purposes, the Secretary shall (A) direct that appropriate measures be taken by the Airports Authority to bring the use of such portion of real property in conformity with airport purposes, and (B) retake possession of such portion of real property if the Airports Authority fails to bring the use of such portion into a conforming use within a reasonable period of time, as determined by the Secretary.

#### **(3) AIP requirements**

The Airports Authority shall be subject to the requirements of section [49 U.S.C.A. § 2210(a)] and the assurances and conditions required of grant recipients under such Act [49 U.S.C.A. § 2201 et seq.] as of the date the lease takes effect. Notwithstanding section 511(a)(12) of such Act [49 U.S.C.A. § 2210 (a)12], all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of such airports.

#### **(4) Contracts**

In acquiring by contract supplies or services for an amount estimated to be in excess of \$200,000, or awarding concession contracts, the Airports Authority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Airports Authority may grant exceptions to the requirements of this paragraph.

#### **(5) Continuation of regulations**

##### **(A) In general**

Except as provided in subparagraph (B) all regulations of the Metropolitan Washington Air-

ports (14 C.F.R. 159) shall become regulations of the Airports Authority on the date the lease takes effect and shall remain in effect until modified or revoked by the Airports Authority in accordance with procedures of the Airports Authority.

##### **(B) Exceptions**

The following regulations shall cease to be in effect on the date the lease takes effect:

- (i) section 159.59(a) of title 14, Code of Federal Regulations (relating to new-technology aircraft); and
- (ii) section 159.191 of title 14, Code of Federal Regulations (relating to violations of Federal Aviation Administration regulations as Federal misdemeanors).

##### **(C) Operations**

The Airports Authority may not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not impose a limitation after the date the lease takes effect on the number of passengers taking off or landing at Washington National Airport.

#### **(6) Transfer of rights, liabilities, and obligations**

##### **(A) In general**

Except as specified in subparagraph (B) of this paragraph, the Airports Authority shall assume all rights, liabilities, and obligations (tangible and incorporeal, present and executory) of the Metropolitan Washington Airports on the date the lease takes effect, including leases, permits, licenses, contracts, agreements,

claims, tariffs, accounts receivable, accounts payable, and litigation relating to such rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. Before the date the lease takes effect, the Secretary shall also assure that the Airports Authority has agreed to cooperate in allowing representatives of the Attorney General and the Secretary adequate access to employees and records when needed for the performance of functions related to the period before the effectiveness of the lease. The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports.

**(B) Exceptions**

The procedure for disputes resolution contained in any contract entered into on behalf of the United States before the date the lease takes effect shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the United States as the owner and operator of the Metropolitan Washington Airports, arising before the date the lease takes effect shall be adjudicated as if the lease had not been entered into.

**(C) Payments into Employees' Compensation Fund**

The Federal Aviation Administration shall remain responsible for reimbursing the Employees' Compensation Fund, pursuant to section 8147 of Title 5 for compensation paid or payable after the date the lease takes effect in accordance with chapter 81 of Title 5 with regard to any injury,

disability, or death due to events arising before such date, whether or not a claim has been filed or is final on such date.

**(D) Collective bargaining rights**

The Airports Authority shall continue all collective bargaining rights enjoyed before the date the lease takes effect by employees of the Metropolitan Washington Airports.

**(7) Audits**

The Comptroller General of the United States may conduct periodic audits of the activities and transactions of the Airports Authority in accordance with generally accepted management principles, and under such rules and regulations as may be prescribed by the Comptroller General. Any such audit shall be conducted at such place or places as the Comptroller General may deem appropriate. All books, accounts, records, reports, files, papers, and property of the Airports Authority shall remain in possession and custody of the Airports Authority.

**(8) Code of ethics**

The Airports Authority shall develop a code of ethics and financial disclosure in order to assure the integrity of all decisions made by its board of directors and employees.

**(9) Restriction on use of certain revenues**

Notwithstanding any other provision of law, no landing fee imposed for operating an aircraft or revenues derived from parking automobiles—

**(A)** at Washington Dulles International Airport may be used for maintenance or operating expenses (excluding debt service, depreciation,

and amortization) at Washington National Airport; or

(B) at Washington National Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington Dulles International Airport.

**(10) General aviation fees**

The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Airports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee not in excess of the landing fee for aircraft weighing 12,500 pounds.

**(11) Other terms**

The Secretary shall include such other terms and conditions applicable to the parties to the lease as are consistent with and carry out the provisions of this subchapter.

**(d) Submission to Congress**

The Secretary shall submit the lease entered into under this section to Congress. The lease may not take effect before the passage of (1) 30 days, or (2) 10 days in which either House of Congress is in session, whichever occurs later.

**(e) Enforcement of lease provisions**

The district courts of the United States shall have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of the lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party.

(Pub.L. 99-500, Title VI, § 6005, Oct. 18, 1986, 100 Stat. 1783-375; Pub.L. 99-591, Title VI, § 6005, Oct. 30, 1986, 100 Stat. 3341-378.)

**§ 2455. Capital improvements, construction, and rehabilitation**

**(a) Improvements**

It is the sense of the Congress that the Airports Authority should—

(1) pursue the improvement, construction, and rehabilitation of the facilities at Washington Dulles International Airport and Washington National Airport simultaneously; and

(2) to the extent practicable, cause the improvement, construction, and rehabilitation proposed by the Secretary to be completed at both of such Airports within 5 years after the earliest date on which the Airports Authority issues bonds under the authority required by section 2456 of this title for any such improvement, construction, or rehabilitation.

**(b) Secretary's assistance**

The Secretary shall assist the three airports serving the Washington, D.C. metropolitan area in planning for operational and capital improvements at those airports and shall accelerate consideration of applications for Federal financial assistance by whichever of the three airports is most in need of increasing airside capacity.

(Pub.L. 99-500, Title VI, § 6006, Oct. 18, 1986, 100 Stat. 1783-378; Pub.L. 99-591, Title VI, § 6006, Oct. 30, 1986, 100 Stat. 3341-381.)

**§ 2456. Airports Authority**

**(a) Powers conferred by Virginia and the District of Columbia**

The Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of

Columbia or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction, but at a minimum meeting the requirements of this section.

**(b) Purpose**

The Airports Authority shall be—

- (1) independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government; and
- (2) a political subdivision constituted solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area.

**(c) General authorities**

The Airports Authority shall be authorized—

- (1) to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes;
- (2) to issue bonds from time to time in its discretion for public purposes, including the purposes of paying all or any part of the cost of airport improvements, construction, and rehabilitation, and the acquisition of real and personal property, including operating equipment for the airports, which bonds—
  - (A) shall not constitute a debt of either jurisdiction or a political subdivision thereof; and
  - (B) may be secured by the Airports Authority's revenues generally, or exclusively from the income and revenues of certain designated projects whether or not they are financed in whole or in part from the proceeds of such bonds;
- (3) to acquire real and personal property by purchase, lease, transfer, or exchange, and to ex-

ercise such powers of eminent domain within the Commonwealth of Virginia as are conferred upon it by the Commonwealth of Virginia;

- (4) to levy fees or other charges; and
- (5) to make and maintain agreements with employee organizations to the extent that the Federal Aviation Administration is so authorized on October 18, 1986.

**(d) Conflict-of-interest provisions**

The Airports Authority shall be subject to a conflict-of-interest provision providing that members of the board and their immediate families may not be employed by or otherwise hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an aeronautical, aviation services, or airport services enterprise that otherwise has interests that can be directly affected by the Airports Authority. Exceptions to requirements of the preceding sentence may be made by the official appointing a member at the time the member is appointed, if the financial interest is fully disclosed and so long as the member does not participate in board decisions that directly affect such interest. The Airports Authority shall include in its code developed under section 2454(c) (8) of this title the standards by which members will determine what constitutes a substantial financial interest and the circumstances under which an exception may be granted.

**(e) Board of directors**

**(1) Appointment**

The Airports Authority shall be governed by a board of directors of 11 members, as follows:

- (A) five members shall be appointed by the Governor of Virginia;

(B) three members shall be appointed by the Mayor of the District of Columbia;

(C) two members shall be appointed by the Governor of Maryland; and

(D) one member shall be appointed by the President with the advice and consent of the Senate.

The Chairman shall be appointed from among the members by majority vote of the members and shall serve until replaced by majority vote of the members.

#### **(2) Restrictions**

Members shall (A) not hold elective or appointive political office, (B) serve without compensation other than for reasonable expenses incident to board functions, and (C) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President shall not be required to reside in that area.

#### **(3) Terms**

Members shall be appointed to the board for a term of 6 years, except that of members first appointed—

(A) by the Governor of Virginia, 2 shall be appointed for 4 years and 2 shall be appointed for 2 years;

(B) by the Mayor of the District of Columbia, 1 shall be appointed for 4 years and 1 shall be appointed for 2 years; and

(C) by the Governor of Maryland, 1 shall be appointed for 4 years.

#### **(4) Removal of Presidential appointees**

A member of the board appointed by the President shall be subject to removal by the President for cause.

#### **(5) Required number of votes**

Seven votes shall be required to approve bond issues and the annual budget.

#### **(f) Board of Review**

##### **(1) Composition**

The board of directors shall be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Airports Authority. Such Board of Review shall be established by the board of directors and shall consist of the following, in their individual capacities, as representatives of users of the Metropolitan Washington Airports:

(A) two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the House of Representatives from a list provided by the Speaker of the House;

(B) two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the Senate from a list provided by the President pro tempore of the Senate; and

(C) one member chosen alternately from members of the House of Representatives and members of the Senate, from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.

The members of the Board of Review shall elect a chairman. A member of the House of Representa-

tives or the Senate from Maryland or Virginia and the Delegate from the District of Columbia may not serve on the Board of Review.

#### **(2) Terms**

Members of the Board of Review appointed under subparagraphs (A) and (B) of paragraph (1) shall be appointed for terms of six years, except that of the members first appointed, one member under each of subparagraphs (A) and (B) shall be appointed for a term of two years and one member under each of subparagraphs (A) and (B) shall be appointed for a term of four years. Members of the Board of Review appointed under subparagraph (C) shall be appointed for terms of two years. A vacancy in the Board shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term.

#### **(3) Procedures**

The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings and for proxy voting. The Board shall meet at least once each year and shall meet at the call of the chairman or 3 members of the Board. Any decision of the Board of Review under paragraph (4) or (5) shall be by a vote of 5 members of the Board.

#### **(4) Disapproval procedure**

##### **(A) Submission required**

An action of the Airports Authority described in subparagraph (B) shall be submitted to the Board of Review at least 30 days (or at least

60 days in the case of the annual budget) before it is to become effective.

##### **(B) Actions affected**

The following are the actions referred to in subparagraph (A):

- (i) the adoption of an annual budget;
- (ii) the authorization for the issuance of bonds;
- (iii) the adoption, amendment, or repeal of a regulation;
- (iv) the adoption or revision of a master plan, including any proposal for land acquisition; and
- (v) the appointment of the chief executive officer.

##### **(C) 30-day disapproval period**

If the Board of Review does not disapprove an action within 30 days of its submission under this paragraph, the action may take effect. If the Board of Review disapproves any such action, it shall notify the Airports Authority and shall give reasons for the disapproval.

##### **(D) Effect of disapproval**

An action disapproved under this paragraph shall not take effect. Unless an annual budget for a fiscal year has taken effect in accordance with this paragraph, the Airports Authority may not obligate or expend any money in such fiscal year, except for (i) debt service on previously authorized obligations, and (ii) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

**(5) Request for consideration of other matters**

The Board of Review may request the Airports Authority to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Airports Authority shall consider and vote, or report, on the matter as promptly as feasible.

**(6) Participation in meetings of Airports Authority**

Members of the Board of Review may participate as nonvoting members in meetings of the board of the Airports Authority.

**(7) Staff**

The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports Authority shall provide such clerical and support staff as the Board may require.

**(8) Liability**

A member of the Board of Review shall not be liable in connection with any claim, action, suit, or proceeding arising from service on the Board.

**(g) Certain actions to be taken by regulation**

Any action of the Airports Authority changing, or having the effect of changing, the hours of operation of or the type of aircraft serving either of the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority.

**(h) Limitation on authority**

If the Board of Review established under subsection (f) of this section is unable to carry out its functions under this subchapter by reason of a judicial order, the

Airports Authority shall have no authority to perform any of the actions that are required by paragraph<sup>1</sup> (f) (4) of this section to be submitted to the Board of Review.

(Pub.L. 99-500, Title VI, § 6007, Oct. 18, 1986, 100 Stat. 1783-379; Pub.L. 99-591, Title VI, § 6007, Oct. 30, 1986, 100 Stat. 3341-382.)

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<sup>1</sup> So in original. Probably should be "subsection".

**§ 2457. Federal employees at Metropolitan Washington Airports**

**(a) Employee protection**

Not later than the date the lease under section 2454 of this title takes effect, the Secretary shall ensure that the Airports Authority has established arrangements to protect the employment interests of employees during the 5-year period beginning on such date. These arrangements shall include provisions—

(1) which ensure that the Airports Authority will adopt labor agreements in accordance with the provisions of subsection (b) of this section;

(2) for the transfer and retention of all employees who agree to transfer to the Airports Authority in their same positions for the 5-year period commencing on the date the lease under section 2454 of this title takes effect except in cases of reassignment, separation for cause, resignation, or retirement;

(3) for the payment by the Airports Authority of basic and premium pay to transferred employees, except in cases of separation for cause, resignation, or retirement, for 5 years commencing on the date the lease takes effect at or above the rates of pay in effect for such employees on such date;

(4) for credit during the 5-year period commencing on the date the lease takes effect for accrued an-

nual and sick leave and seniority rights which have been accrued during the period of Federal employment by transferred employees retained by the Airports Authority; and

(5) for an offering of not less than one life insurance and three health insurance programs for transferred employees retained by the Airports Authority during the 5-year period beginning on the date the lease takes effect which are reasonably comparable with respect to employee premium cost and coverage to the Federal health and life insurance programs available to employees on the day before such date.

**(b) Labor agreements**

**(1) Adoption**

The Airports Authority shall adopt all labor agreements which are in effect on the date the lease under section 2454 of this title takes effect. Such agreements shall continue in effect for the 5-year period commencing on such date, unless the agreement provides for a shorter duration or the parties agree to the contrary before the expiration of that 5-year period. Such agreements shall be renegotiated during the 5-year period, unless the parties agree otherwise. Any labor-management negotiation impasse declared before the date the lease takes effect shall be settled in accordance with chapter 71 of Title 5.

**(2) Continuation**

The arrangements made pursuant to this section shall assure, during the 50-year lease term, the continuation of all collective bargaining rights enjoyed by transferred employees retained by the Airports Authority.

**(c) Rights of terminated employees**

Any transferred employee whose employment with the Airports Authority is terminated during the 5-year period beginning on the date the lease under section 2454 of this title takes effect shall be entitled, as a condition of any lease entered into in accordance with section 2454 of this title, to rights and benefits to be provided by the Airports Authority that are similar to those such employee would have had under Federal law if termination had occurred immediately before such date.

**(d) Annual and sick leave**

Any employee who transfers to the Airports Authority under this section shall not be entitled to lump-sum payment for unused annual leave under section 5551 of Title 5, but shall be credited by the Airports Authority with the unused annual leave balance on the date the lease under section 6005 takes effect, along with any unused sick leave balance on such date. During the 5-year period beginning on such date, annual and sick leave shall be earned at the same rates permitted on the day before such date, and observed official holidays shall be the same as those specified in section 6103 of Title 5.

**(e) Civil Service retirement**

Any Federal employee who transfers to the Airports Authority and who on the day before the date the lease under section 2454 of this title takes effect is subject to subchapter III, of chapter 83 of Title 5 or chapter 84 of such title shall, so long as continually employed by the Airports Authority without a break in service, continue to be subject to such subchapter or chapter, as the case may be. Employment by the Airports Authority without a break in continuity of service shall be considered to be employment by the United States Government for purposes of such subchapter and chapter. The Air-

ports Authority shall be the employing agency for purposes of such subchapter and chapter and shall contribute to the Civil Service Retirement and Disability Fund such sums as are required by such subchapter and chapter.

**(f) Separated employees**

An employee who does not transfer to the Airports Authority and who does not otherwise remain a Federal employee shall be entitled to all of the rights and benefits available under Federal law for separated employees, except that severance pay shall not be payable to an employee who does not accept an offer of employment from the Airports Authority of work substantially similar to that performed for the Federal Government.

**(g) Access to records**

The Airports Authority shall allow representatives of the Secretary adequate access to employees and employee records of the Airports Authority when needed for the performance of functions related to the period before the date the lease under section 2454 of this title takes effect. The Secretary shall provide the Airports Authority access to employee records of transferring employees for appropriate purposes.

(Pub.L. 99-500, Title VI, § 6008, Oct. 18, 1986, 100 Stat. 1783-382; Pub.L. 99-591, Title VI, § 6008, Oct. 30, 1986, 100 Stat. 3341-385.)

**§ 2458. Relationship to and effect of other laws**

**(a) Other laws**

In order to assure that the Airports Authority has the same proprietary powers and is subject to the same restrictions with respect to Federal law as any other airport except as otherwise provided in this subchapter, dur-

ing the period that the lease authorized by section 2454 of this title is in effect—

(1) the Metropolitan Washington Airports shall be considered public airports for purposes of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2201 et seq.); [49 U.S.C.A. § 2201 et seq.]; and

(2) the Acts entitled "An Act to provide for the administration of the Washington National Airport, and for other purposes", approved June 29, 1940 (54 Stat. 686), "An Act to authorize the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia", approved September 7, 1950 (64 Stat. 770), and "An Act making supplemental appropriations for the support of the Government for the fiscal year ending June 30, 1941, and for other purposes", approved October 9, 1940 (54 Stat. 1030), shall not apply to the operation of the Metropolitan Washington Airports, and the Secretary shall be relieved of all responsibility under those Acts.

**(b) Inapplicability of certain laws**

The Metropolitan Washington Airports and the Airports Authority shall not be subject to the requirements of any law solely by reason of the retention by the United States of the fee simple title to such airports or by reason of the authority of the Board of Review under subsection 2456(f) of this title.

**(c) Police power**

The Commonwealth of Virginia shall have concurrent police power authority over the Metropolitan Washington Airports, and the courts of the Commonwealth of Virginia may exercise jurisdiction over Washington National Airport.

**(d) Planning****(1) In general**

The authority of the National Capital Planning Commission under section 71d of Title 40 shall not apply to the Airports Authority.

**(2) Consultation**

The Airports Authority shall consult—

(A) with the National Capital Planning Commission and the Advisory Council on Historic Preservation before undertaking any major alterations to the exterior of the main terminal at Washington Dulles International Airport, and

(B) with the National Capital Planning Commission before undertaking development that would alter the skyline of Washington National Airport when viewed from the opposing shoreline of the Potomac River or from the George Washington Parkway.

**(e) Operation limitations****(1) High Density Rule**

The Administrator may not increase the number of instrument flight rule takeoffs and landings authorized for air carriers by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport on October 18, 1986 and may not decrease the number of such takeoffs and landings except for reasons of safety.

**(2) Annual passenger limitations**

The Federal Aviation Administration air traffic regulation entitled "Modification of Allocation: Wash-

ington National Airport" (14 C.F.R. 93.124) shall cease to be in effect on October 18, 1986.

(Pub.L. 99-500, Title VI, § 6009, Oct. 18, 1986, 100 Stat. 1783-384; Pub.L. 99-591, Title VI, § 6009, Oct. 30, 1986, 100 Stat. 3341-387.)

**§ 2459. Authority to negotiate extension of lease**

The Secretary and the Airports Authority may at any time negotiate an extension of the lease entered into under section 2454(a) of this title.

(Pub.L. 99-500, Title VI, § 6010, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6010, Oct. 30, 1986, 100 Stat. 3341-388.)

**§ 2460. Separability**

Except as provided in section 2456(h) of this title, if any provision of this subchapter or the application thereof to any person or circumstance, is held invalid, the remainder of this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub.L. 99-500, Title VI, § 6011, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6011, Oct. 30, 1986, 100 Stat. 3341-388.)

**§ 2461. Nonstop flights****Perimeter rule**

An air carrier may not operate an aircraft nonstop in air transportation between Washington National Airport and another airport that is more than 1,250 statute miles away from Washington National Airport.

(Pub.L. 99-500, Title VI, § 6012, Oct. 18, 1986, 100 Stat. 1783-385; Pub.L. 99-591, Title VI, § 6012, Oct. 30, 1986, 100 Stat. 3341-388.)

**28 U.S.C. § 1254 (1988). Courts of appeals; certiorari; certified questions**

Cases in the courts of appeal<sup>s</sup> may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

**1985 SESSION  
VIRGINIA ACTS OF ASSEMBLY—CHAPTER 598**

*An Act to create a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government.*

[S 711]

Approved Apr. 03, 1985

Be it enacted by the General Assembly of Virginia:

1. § 1. Definitions.—For the purposes of this act the following terms and phrases shall have the following meanings:

“Authority Facilities” shall mean any or all airport facilities now existing or hereafter acquired or constructed or caused to be constructed by the Authority under this act, and together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, including the existing Dulles Airport Access Road and its right-of-way, acquired or constructed by the Authority;

“Authority” shall mean the Metropolitan Washington Airports Authority hereinafter created or, if the Authority shall be abolished, the board, body, or commission or agency succeeding to the principal functions thereof or upon whom the powers given by this act to the Authority shall be conferred by law;

“Cost” shall mean, as applied to Authority Facilities, the cost of acquisition of all lands, structures, rights-of-way, franchises, easements and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing or relocating any

buildings or structures on lands acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if deemed advisable by the Authority, for a period not exceeding one year after completion of such construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the Authority Facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the creditworthiness of the bonds, and such other expenses as may be necessary or incidental to the construction of the Authority Facilities, the financing of such construction and the placing of the Authority Facilities in operation. Any obligation or expenses incurred by the Commonwealth or any agency thereof, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the Authority Facilities may be regarded as part of the cost of the Authority Facilities and may be reimbursed to the Commonwealth or such agency out of any funds available therefor or the proceeds of the revenue bonds issued for such Authority Facilities as hereinafter authorized.

"Bonds" or "revenue bonds" shall mean bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

**§ 2. Metropolitan Washington Airports Authority created.—**There is hereby created the Metropolitan Wash-

ton Airports Authority, hereafter referred to as the Authority, a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia.

**§ 3. Metropolitan Washington Airports Authority.—**The Metropolitan Washington Airports Authority created by this act is hereby authorized, when similarly authorized by the District of Columbia, to acquire from the United States of America, by lease or otherwise, the two airports known as Washington National Airport and Washington Dulles International Airport and all related properties now administered by Metropolitan Washington Airports, an agency of the Federal Aviation Administration of the United States Department of Transportation, but only with the approval of the Governor of Virginia. Subject to such gubernatorial approval, general consent is hereby given to conditions imposed by the Congress of the United States on such acquisitions that are not inconsistent with this act.

**§ 4. Membership; terms; officers.—A.** The Authority shall consist of eleven members: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States. Members representing the Commonwealth of Virginia shall be subject to confirmation by the Virginia General Assembly. For the purposes of doing business, six members shall constitute a quorum. The failure of a single appointing official to appoint one or more members, as herein provided, shall not impair the Authority's creation when the other conditions thereof have been met.

**B.** Members shall (i) not hold elective or appointive public office, (ii) serve without compensation, and (iii)

reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties.

C. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as follows: each jurisdiction shall appoint one member for a full six-year term, a second member for a four-year term and in the case of the Commonwealth and the District of Columbia, a third member for a two-year term. The Governor of Virginia shall make the final two Virginia initial appointments for one two-year and one four-year term. The President shall make initial and subsequent appointments for six-year terms.

D. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

E. Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he is appointed.

F. The Authority shall annually elect one of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be members of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to other duties, discharge such functions of the secretary and the treasurer.

G. The members of the Authority shall continue to serve until their successors shall be duly appointed. Any person appointed to fill a vacancy shall serve for the un-

expired term. Any member of the Authority shall be eligible for reappointment for one term.

H. The members of the Authority shall not be personally liable for any act done or action taken in their capacities as members of the Authority, nor shall they be personally liable for any bond, note or other evidence of indebtedness issued by the Authority.

§ 5. Powers and duties of the Authority.—For the purpose of acquiring, operating, maintaining, developing, promoting and protecting Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metropolitan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

1. To adopt and amend by-laws for the regulation of its affairs and the conduct of its business;
2. To plan, establish, operate, develop, construct, enlarge, maintain, equip, operate and protect the airports;
3. To adopt and amend regulations to carry out the powers granted by this section;
4. To adopt an official seal and alter the same at its pleasure;
5. To appoint one or more advisory committees;
6. To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;
7. To borrow money on a short-term basis and issue from time to time its notes therefor payable on such terms, conditions or provisions as it may deem advisable;
8. To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;

9. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

10. To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary, and to fix their compensation and benefits. However, the Authority shall comply with any Act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

11. To sue and be sued in its own name, plead and be impleaded;

12. To construct or permit the construction of commercial and other facilities upon the airport property on terms established by the Authority and consistent with the purposes of this act;

13. To make and enter into all contracts and agreements necessary or desirable to the performance of its duties, the proper operation of the airports and the furnishing of services to the travelling public and airport users, and such contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services, or conserve airport property and the airport environment;

14. To apply for, receive and accept such payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; and

15. To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

§ 6. Authority rules and regulations.—The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and

operation of its facilities and governing the conduct of persons and organizations using its facilities.

Unless the Authority shall by unanimous vote of all members present determine that an emergency exists, the Authority shall, prior to the adoption of any rule or regulation or alteration, amendment or modification thereof:

a. Make such rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least ten days;

b. Publish a notice in a newspaper or newspapers of general circulation in the political subdivision where the Authority's Facilities are located declaring the Authority's intention to consider adopting such rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of such rule or regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

c. Hold the public hearing on the day and at the time specified in such notice or any adjournment thereof, and hear persons appearing for or against such rule, regulation, alteration, amendment or modification.

The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

The Authority's rules and regulations relating to:

a. Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

b. Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

c. Aircraft operation and maintenance; shall have the force and effect of law, as shall any other rule or regulation of the Authority which shall contain a determination by the Authority that it is necessary to accord the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rules and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the political subdivision in which such rules or regulations are to be enforced. The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the same manner as if it had been committed on the public roads of the political subdivision in which such violation occurred; all other violations of the Authority's rules and regulations having the force and effect of law shall be punishable as misdemeanors.

§ 7. Police powers.—The Authority's employees meeting the minimum requirements of the Criminal Justice Officers Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's Facilities are located. The authority conferred upon such special policemen shall be exercised only upon the Authority's Facilities and shall be in all terms consistent with the requirements of Chapter 3 of Title 15.1 of the Code of Virginia.

Such special policemen shall have all powers vested in police officers under Chapter 3 of Title 15.1 of the Code of Virginia and shall be responsible upon the Authority's Facilities for enforcing the Authority's rules and regulations and all other applicable statutes, ordinances, rules, and regulations of this Commonwealth and political subdivisions, agencies, and instrumentalities thereof.

Such special policemen may issue summons to appear, or arrest on view or on information without warrant as

permitted by law, and conduct before any court of competent jurisdiction any person violating any rule or regulation.

For the purpose of enforcing such statutes, ordinances, rules and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivision wherein the offense was committed shall have jurisdiction to try a person charged with the violation of any such statutes, ordinances, rules and regulations.

§ 8. Operation of foreign trade zone.—The Authority is authorized and empowered to establish, operate and maintain a foreign trade zone and otherwise to expedite and encourage foreign commerce.

§ 9. Acquisition of property; eminent domain.—A. The Authority is hereby authorized to acquire by purchase, lease or grant such additional lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands as it may deem necessary or convenient for construction and operation of the airports, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof.

B. Any political subdivision of the Commonwealth, all or a part of which is located within sixty miles of Authority Facilities is authorized to provide services, to donate real or personal property and to make appropriations to the Authority for the acquisition, construction, maintenance, and operation of the Authority Facilities. Any such political subdivision is hereby authorized to issue its bonds in the manner provided in the Public Finance Act or in any applicable municipal charter for the purpose of providing funds to be appropriated to the Authority. The Authority may agree to assume, or reimburse such a political subdivision for any indebtedness incurred by such political subdivision with respect to facilities conveyed by it to the Authority. With the consent

of the governing body of the political subdivision any such agreement may be made subordinate to the Authority's indebtedness to others.

C. The Authority established hereunder is hereby granted full power to exercise the right of eminent domain in the acquisition of any lands, easements, privileges or other property interests which are necessary for airport and landing field purposes, including the right to acquire, by eminent domain, aviation easements over lands or water outside the boundaries of its airports or landing fields where necessary in the interests of safety for aircraft to provide unobstructed air space for the landing and taking off of aircraft utilizing its airports and landing fields even though such aviation easement be inconsistent with the continued use of such land, or inconsistent with the maintenance, preservation and renewal of any structure or any tree or other vegetation standing or growing on the land at the time of such acquisition. Proceedings for the acquisition of such lands, easements and privileges by condemnation may be instituted and conducted in the name of the Authority in accordance with Title 25 of the Code of Virginia.

**§ 10. Revenue bonds.**—The Authority is hereby authorized to provide resolution for the issuance, at one time or from time to time, of revenue bonds of the Authority for the purpose of paying all or any part of the cost of Authority Facilities, including the refunding of federal appropriations not reimbursed to the United States Treasury by the Metropolitan Washington Airports. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. The bonds of each issue shall be dated, shall mature at such time or times not exceeding forty years from their date or dates, as may be determined by the Authority, and may be subject to redemption or repurchase before maturity, at the option of the Authority, at such price or prices and under such terms and condi-

tions as may be fixed by the Authority prior to the issuance of the bonds. The bonds may bear interest payable at such time or times and at such rate or rates as determined by the Authority or as determined in such manner as the Authority may provide, including the determination by agents designated by the Authority under guidelines established by it. The Authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the Commonwealth of Virginia. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. Notwithstanding any other provision of this act or any recitals in any bonds issued under the provisions of this section, all such bonds shall be deemed to be negotiable instruments under the laws of the Commonwealth of Virginia. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell such bonds in such manner, either at public or negotiated sale, and for such price, as it may determine will best effect the purposes of this section.

The proceeds of the bonds shall be used solely for the payment of the cost of Authority Facilities, including improvements, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such

bonds or in the trust agreement hereinafter mentioned securing the same. If the proceeds of the bonds of any issue, by error of estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficit, and, unless otherwise provided in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds of any issue shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund for such bonds.

Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. Bonds may be issued under the provisions of this section without obtaining the consent of any agency of the Commonwealth of Virginia, and without any other proceedings, conditions or things not specifically required by this section.

**§ 11. Refunding bonds.**—The Authority is hereby authorized to provide by resolution for the issuance of its revenue refunding bonds for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and if deemed advisable by the Authority, for either or both of the following additional purposes: constructing improvements, extensions or enlargement of the Authority Facilities in connection with which the bonds to be refunded shall have been issued, and paying all or

any part of the cost of any additional Authority Facilities. The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect to the same, shall be governed by the provisions of this act insofar as the same may be applicable. Revenue refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this act and, if sold, the proceeds thereof may be applied to the purchases, redemption or payment of such outstanding bonds.

**§ 12. Pledge of funds.**—All moneys received pursuant to the provisions of this act, whether as proceeds from the sale of bonds, as revenues, or as grants, appropriations or other funds provided by federal, state or local governments, may be pledged to the payment of bonds issued by the Authority, if so pledged, shall be deemed to be trust funds to be held and applied solely as provided in this act.

**§ 13. Marketability of bonds.**—The Authority is authorized and empowered to exercise all or any part or combination of the powers herein granted, to make covenants other than and in addition to the covenants herein expressly authorized, of like, or different character; to make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds or, in the absolute discretion of the Authority, as will tend to make the bonds more marketable, notwithstanding that such covenants, acts or things may not be enumerated herein.

**§ 14. Bonds as legal investments and security for public deposits.**—Bonds issued by the Authority under the provisions of this act are hereby made securities in which all public officers and public bodies of the Commonwealth and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fidu-

ciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the Commonwealth for any purpose for which the deposit of bonds or obligations is now or may hereafter be authorized by law.

**§ 15. Credit of Commonwealth and political subdivisions not pledged.**—Revenue bonds issued under the provisions of this act shall not constitute a debt of the Commonwealth of Virginia or of any other political subdivision thereof nor a pledge of the faith and credit of the Commonwealth or of any political subdivision thereof. Such bonds shall be payable solely from funds provided therefor from revenues. The issuance of revenue bonds under the provisions of this act shall not directly, indirectly, or contingently obligate the Commonwealth or any political subdivision thereof to the payment thereof or to the levy or pledge of any form of taxation whatever therefor. All such revenue bonds shall contain a statement on their face substantially to this effect.

**§ 16. Trust agreement.**—In the discretion of the Authority any bonds issued under the provisions of this act may be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the power of a trust company within or without the Commonwealth of Virginia. Such trust agreement or the resolution providing for the issuance of such bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the airports or any part thereof. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the

Authority in relation to the acquisition of property and the construction, improvement, maintenance, repair, operation and insurance of the airports, the rates or fees or other charges to be charged, and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the Commonwealth of Virginia which may act as depositary of the proceeds of bonds or of revenues to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Any such trust agreement may set forth the rights and remedies of the bondholders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of the airports.

**§ 17. Revenues.**—The Authority is hereby authorized to fix, revise, charge and collect fees or other charges for the use of the airports and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the airports for placing thereon telephone, telegraph, electric light or power lines, and to fix the terms, conditions, rents and fees or other charges for such use. Such fees or other charges shall be so fixed and adjusted in respect of the aggregate of fees or other charges from the airports as to provide a fund sufficient with other revenues, if any, (i) to pay the cost of maintaining, repairing and operating the airports, (ii) to pay the principal of and interest on such bonds as the same shall become due and payable, and (iii) to create reserves for such purposes. The fees and other charges and all other revenues derived from the airports, except such part thereof as may be necessary to pay such cost of maintenance, repair and

operation and provide such reserves as may be provided for in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made. The fees and other charges and other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of moneys to the credit of such sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Except as may otherwise be provided in such resolution or such trust agreement, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another.

**§ 18. Trust funds.**—All proceeds from the sale of bonds and revenues derived therefrom received pursuant to the provisions of this act shall be deemed to be trust funds to be held and applied solely as provided in this act. The Authority may, in the resolution authorizing the bonds or in the trust agreement securing such bonds, pro-

vide for the payment of the proceeds of the sale of the bonds and the revenues of the Authority to a trustee, which may be any trust company or bank having the powers of a trust company within or without the Commonwealth of Virginia, which shall act as trustee of the funds and hold and apply the same to the purposes of this act, subject to such regulations as this act and such resolution or trust agreement may provide. The trustee may invest and reinvest such funds in such securities as may be provided in the resolution authorizing the bonds or in the trust agreement securing such bonds.

**§ 19. Annual audit.**—The Authority shall keep suitable records of all its financial transactions and shall have the same audited annually. Copies of such audit shall be furnished to the Governor of the Commonwealth of Virginia and to the Mayor of the District of Columbia and shall be open to public inspection.

**§ 20. Remedies.**—Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given, may be restricted by such trust agreement, may either at law or in equity, by suit, action, injunction, mandamus or other proceedings, protect and enforce any and all rights under the laws of the Commonwealth of Virginia, or granted by this act or under such trust agreement or the resolution authorizing the issuance of such bonds and may enforce and compel the performance of all duties required by this act or by such agreement or resolution to be performed by the Authority or by any officer or agent thereof including the fixing, charging and collection of fees or other charges.

**§ 21. Exemption from taxation.**—The exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the Commonwealth of Vir-

ginia, for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience and prosperity, and as the operation and maintenance of the airports by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon the airports or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom; and the bonds issued under the provisions of this act, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free and exempt from taxation by the Commonwealth of Virginia and by any municipality, county or other political subdivision thereof.

**§ 22. Jurisdiction of courts; liability for contracts and torts.—A.** The courts of the Commonwealth of Virginia shall have original jurisdiction of all actions brought by or against the Authority, which courts shall in all cases apply the law of the Commonwealth of Virginia.

**B.** The Authority shall be liable for its contracts and for its torts and those of its members, officers, employees, and agents committed in the conduct of any proprietary function, in accordance with the law of the Commonwealth of Virginia but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing in this act shall be construed as a waiver by the Commonwealth of Virginia or the District of Columbia or of their political subdivisions of any immunity from suit.

**C.** The Authority shall be responsible for all executory contracts entered into by the United States with respect to the former Metropolitan Washington Airports before

the date of acquisition of those airports, except that the procedure for disputes resolution contained in any such contract shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract.

**D.** The Authority shall not be responsible for any tort claims arising before the date of transfer.

**§ 23. Procurement Act exemption.—**In light of the multi-jurisdictional nature of the Authority, an exemption is hereby provided to the Authority from the provisions of the Virginia Public Procurement Act.

**§ 24. Act liberally construed.—**This act, being necessary for the welfare of the Commonwealth of Virginia and its inhabitants, shall be liberally construed to effect the purposes thereof.

**§ 25. Constitutional construction.—**The provisions of this act are severable and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions of this act. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included therein.

**§ 26. Inconsistent laws inapplicable.—**All other general or special laws inconsistent with any provision of this act are hereby declared to be inapplicable to the provisions of this act.

**§ 27. Effective date.—**This act shall only become effective upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to an Airport Authority created by the legislatures of the Commonwealth of Virginia and the

District of Columbia pursuant to an agreement or compact that is consistent with the provisions of this act: provided, however, the Governor may make appointments for initial Authority membership at such time or times following the passage of this act as he may deem appropriate.

## 1987 SESSION

## VIRGINIA ACTS OF ASSEMBLY—CHAPTER 665

*An Act to amend and reenact §§ 1, 4, 5, 6, 7 and 27 of Chapter 598 of the 1985 Acts of Assembly which created a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government, relating to definitions; powers, duties, rules, regulations and police powers of the authority; and the effective date of the chapter; penalty.*

[S 672]

Approved Apr. 8, 1987

Be it enacted by the General Assembly of Virginia:

1. That §§ 1, 4, 5, 6, 7 and 27 of Chapter 598 of the 1985 Acts of Assembly are amended and reenacted as follows:

§ 1. Definitions.—For the purposes of this act the following terms and phrases shall have the following meanings:

“Authority Facilities” shall mean any or all airport facilities now existing or hereafter acquired or constructed or caused to be constructed by the Authority under this act, and together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery, equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, including the existing Dulles Airport Access Road and its right-of-way, acquired or constructed by the Authority;

“Authority” shall mean the Metropolitan Washington Airports Authority [hereinafter] <sup>[\*]</sup> created by this act

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[\*] Bracketed material struck through on original.

*and by similar enactment by the District of Columbia or, if the Authority shall be abolished, the board, body, or commission or agency succeeding to the principal functions thereof or upon whom the powers given by this act to the Authority shall be conferred by law;*

"Cost" shall mean, as applied to Authority Facilities, the cost of acquisition of all lands, structures, rights-of-way, franchises, easements and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing or relocating any buildings or structures on lands acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if deemed advisable by the Authority, for a period not exceeding one year after completion of such construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the Authority Facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the creditworthiness of the bonds, and such other expenses as may be necessary or incidental to the construction of the Authority Facilities, the financing of such construction and the placing of the Authority Facilities in operation. Any obligation or expenses incurred by the Commonwealth or any agency thereof, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the Authority Facilities may be regarded as part of the cost of the Authority Facilities and may be reimbursed to the Commonwealth or such

agency out of any funds available therefor or the proceeds of the revenue bonds issued for such Authority Facilities as hereinafter authorized.

"Bonds" or "revenue bonds" shall mean bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

§ 4. Membership; terms; officers.—A. The Authority shall consist of eleven members: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States. Members representing the Commonwealth of Virginia shall be subject to confirmation by the Virginia General Assembly. For the purposes of doing business, six members shall constitute a quorum. The failure of a single appointing official to appoint one or more members, as herein provided, shall not impair the Authority's creation when the other conditions thereof have been met.

B. Members shall (i) not hold elective or appointive public office, (ii) serve without compensation, and (iii) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties.

C. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as follows: each jurisdiction shall appoint one member for a full six-year term, a second member for a four-year term and in the case of the Commonwealth and the District of Columbia, a third member for a two-year

term. The Governor of Virginia shall make the final two Virginia initial appointments for one two-year and one four-year term. The President shall make initial and subsequent appointments for six-year terms.

D. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

E. Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he is appointed.

F. The Authority shall annually elect one of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be members of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to their duties, discharge such functions of the secretary and the treasurer.

G. The members of the Authority shall continue to serve until their successors shall be duly appointed. Any person appointed to fill a vacancy shall serve for the unexpired term. Any member of the Authority shall be eligible for reappointment for one term.

H. The members of the Authority, *including any non-voting members*, shall not be personally liable for any act done or action taken in their capacities as members of the Authority, *or its board of review*, nor shall they be personally liable for any bond, note or other evidence of indebtedness issued by the Authority.

**§ 5. Powers and duties of the Authority.—A.** For the purpose of acquiring, operating, maintaining, developing, promoting and protecting Washington National Airport and Washington Dulles International Airport together as

primary airports for public purposes serving the metropolitan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

1. To adopt and amend bylaws for the regulation of its affairs and the conduct of its business;
2. To plan, establish, operate, develop, construct, enlarge, maintain, equip, [operate] and protect the airports;
3. To adopt and amend regulations to carry out the powers granted by this section;
4. To adopt an official seal and alter the same at its pleasure;
5. To appoint one or more advisory committees *and to establish a board of review*;
6. To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;
7. To borrow money on a short-term basis and issue from time to time its notes therefor payable on such terms, conditions or provisions as it may deem advisable;
8. To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;
9. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;
10. To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary, and to fix their compensation and benefits. [However, the] *Employees of the Authority shall not participate in any strike or assert any right to*

*strike against the Authority, and any employment agreement entered into by the Authority shall contain an explicit prohibition against strikes by the employee or employees covered by such agreement.* The Authority shall comply with any Act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

11. To sue and be sued in its own name, plead and be impleaded;

12. To construct or permit the construction of commercial and other facilities *consistent with the purposes of this act* upon the airport property on terms established by the authority [and consistent with the purposes of this act];

13. To make and enter into all contracts and agreements necessary or desirable to the performance of its duties, the proper operation of the airports and the furnishing of services to the travelling public and airport users, *including contracts for normal governmental services on a reimbursable basis with local political subdivisions where the Authority Facilities are situated and with the District of Columbia government; and any such contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services, or conserve airport property and the airport environment;*

14. To apply for, receive and accept such payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; [and]

15. *To make payments to reimburse the local political subdivisions where the Authority Facilities are situated for extraordinary law enforcement costs incurred by such localities; and*

[15.] 16. To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

B. Pursuant to Section 6007 (b) of the Metropolitan Washington Airports Act of 1986, the Authority is established solely to operate and improve both metropolitan Washington airports as primary airports serving the metropolitan Washington area and shall be independent of the Commonwealth and its local political subdivisions, the District of Columbia and the federal government in the performance and exercise of the airport-related duties and powers enumerated in subdivisions 1 through 16 of subsection A of this section. Any conflict between the exercise of these enumerated powers by the Authority and the powers of any local political subdivision within which Authority Facilities are situated shall be resolved in favor of the Authority.

§ 6. Authority rules and regulations.— A. The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities.

B. Unless the Authority shall by unanimous vote of all members present determine that an emergency exists, the Authority shall, prior to the adoption of any rule or regulation or alteration, amendment or modification thereof:

[a.] 1. Make such rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least ten days;

[b.] 2. Publish a notice in a newspaper or newspapers of general circulation in the District of Columbia and in the local political [subdivision] subdivisions of the Commonwealth where the [Authority's] Authority Facilities

are located declaring the Authority's intention to consider adopting such rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of such rule or regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

[c.] 3. Hold the public hearing on the day and at the time specified in such notice or any adjournment thereof, and hear persons appearing for or against such rule, regulation, alteration, amendment or modification.

C. The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

D. The Authority's rules and regulations relating to:

[a.] (i) Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

[b.] (ii) Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

[c.] (iii) Aircraft operation and maintenance; shall have the force and effect of law, as shall any other rule or regulation of the Authority which shall contain a determination by the Authority that it is necessary to accord the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rules and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the *local* political subdivision in which such rules or regulations are to be enforced. [The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the

same manner as if it had been committed on the public roads of the political subdivision in which such violation occurred; all other violations of the Authority's rules and regulations having the force and effect of law shall be punishable as misdemeanors.]

E. *The violation of any rule or regulation of the Authority establishing a noise limitation on aircraft that operate at the Authority Facilities shall subject the violator, in the discretion of the circuit court of any political subdivision where the facility is located to a civil penalty not to exceed \$2,500 for each violation. Such penalty shall be paid to the Authority. With the consent of the violator or the accused violator of a rule establishing aircraft noise limits, the Authority may provide, in an order issued against the violator or accused violator, for the payment of civil charges in specific sums not to exceed the limit that could be imposed by the court. Such civil charge when paid shall be in lieu of any civil penalty which could be imposed by the court. Any court proceeding shall be within the exclusive jurisdiction of the circuit court and shall be a civil proceeding at law brought by the Authority.*

F. *The violation of any Authority rule or regulation, having the force and effect of law, shall be a Class 1 misdemeanor unless otherwise specified by this chapter or unless a lesser penalty is set by the Authority in the rule or regulation. The rules of criminal procedure and evidence that apply throughout the Commonwealth shall apply to the adjudication of any case involving the violation of any Authority rule or regulation having the force and effect of law.*

G. *The courts of this Commonwealth shall take judicial notice of the Authority's regularly adopted rules and regulations. For the convenience of the courts which may regularly hear cases arising under the Authority's rules and regulations, the Authority may certify to the clerk*

of such court a copy of its rules and regulations. Any such certification, when signed by the chairman of the Metropolitan Washington Airports Authority, shall be accepted as evidence of the facts therein stated.

*H. With respect to the violation of any statute of the Commonwealth, local ordinance or Authority rules or regulation having the force and effect of law occurring at the Authority Facilities:*

*1. The matter shall be within the jurisdiction of the state courts of the political subdivision where the violation occurred; violations occurring at Washington National Airport shall be within the jurisdiction of the courts for Arlington County;*

*2. The attorney for the Commonwealth shall have authority to prosecute those offenses in the name of the Commonwealth or local government as appropriate; and the county or city attorney, if otherwise authorized to prosecute offenses in the name of the county or city, shall have authority to prosecute those offenses in the name of the county or city; and*

*3. Sheriffs and clerks of the court shall provide those same services and exercise those same powers with respect to Authority Facilities within their jurisdiction as for their political subdivisions.*

**§ 7. Police.**— [The Authority's employees meeting the minimum requirements of the Criminal Justice Officers Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's Facilities are located. The authority conferred upon such special policemen shall be exercised only upon the Authority's Facilities and shall be in all terms consistent with the requirements of Chapter 3 of Title 15.1 of the Code of Virginia.] *A. The Commonwealth hereby grants, accepts and agrees to concurrent police power authority over the Metropolitan Washington Airports as provided in Section*

*6009 (c) of the Metropolitan Washington Airports Act of 1986.*

*B. The Authority is authorized to establish and maintain a regular police force and to confer police powers to be exercised with respect to offenses occurring on the Authority Facilities upon its employees meeting the minimum requirements of the Department of Criminal Justice Services.*

Such [special policemen] police officers shall have all powers vested in police officers under Chapter 3 of Title 15.1, Chapter 11 of Title 16.1, Title 18.2 and Title 46.1 of the Code of Virginia and shall be responsible upon the [Authority's] Authority Facilities and within 300 yards of the Facilities for enforcing the laws of the Commonwealth, the Authority's rules and regulations and all other applicable [statutes,] ordinances, rules, and regulations [of this Commonwealth and political subdivisions, agencies, and instrumentalities thereof].

Such [special policemen] police officers may issue summons to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any [court] judicial officer of competent jurisdiction any person violating, upon Authority Facilities, any rule or regulation of the Authority, any ordinance or regulation of any local political subdivision, or any other law of the Commonwealth.

[For the purpose of enforcing such statutes, ordinances, rules and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivision wherein the offense was committed shall have jurisdiction to try a person charged with the violation of any such statutes, ordinances, rules and regulations.]

*C. The Department of State Police shall exercise the same powers upon Authority Facilities as elsewhere in the Commonwealth.*

*D. The Authority may enter into reciprocal or mutual aid agreements with the local political subdivisions in*

*which the Authority Facilities are situated, any agency of the Commonwealth or of the federal government, or any combination of the foregoing, for cooperation in the furnishing of police services.*

*E. The police force of Arlington County shall have concurrent jurisdiction with the police force established herein at Washington National Airport. The Authority shall enter into an agreement with Arlington County regarding the exercise of police authority.*

*F. The sheriffs and police forces of Loudoun and Fairfax Counties shall continue to exercise concurrent jurisdiction with the police force established herein over the Authority Facilities situated within their respective counties.*

§ 27. Effective date.—This act shall only become effective upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to [an Airport] *the Authority* [created by the legislatures of the Commonwealth of Virginia and the District of Columbia pursuant to an agreement or compact that is consistent with the provisions of this act]; provided, however, the Governor may make appointments for initial Authority membership at such time or times following the passage of this act as he may deem appropriate.

2. That an emergency exists and this act is in force from its passage.

COUNCIL OF THE DISTRICT OF COLUMBIA  
NOTICE

D.C. LAW 6-67

"District of Columbia Regional Airports Authority Act of 1985".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 6-200 on first and second readings, September 10, 1985, and September 24, 1985, respectively. Following the signature of the Mayor on October 9, 1985, this legislation was assigned Act No. 6-90, published in the November 1, 1985, edition of the *D.C. Register*, (Vol. 32 page 6093) and transmitted to Congress on October 10, 1985 for a 30-day review, in accordance with Section 602 (c) (1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 6-67, effective December 3, 1985.

/s/ David A. Clarke  
DAVID A. CLARKE  
Chairman of the Council

*Dates Counted During the 30-day Congressional Review Period:*

October 10,11,16,17,18,21,22,23,24,25,28,29,30,31

November 1,4,5,6,7,8,12,13,14,15,18,19,20,21,22

December 2

**AN ACT**  
**D.C. ACT 6-90**

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**IN THE COUNCIL OF  
 THE DISTRICT OF COLUMBIA**

Oct. 09, 1985

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To endorse on behalf of the District government the creation of a regional airport authority to acquire Washington National Airport and Washington Dulles International Airport from the federal government.

**BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA**, That this act may be cited as the "District of Columbia Regional Airports Authority Act of 1985".

**Sec. 2. Definitions.** For the purposes of this act, the term:

(1) "Authority facilities" means any or all airport facilities now existing or subsequently acquired or constructed or caused to be constructed by the Authority under this act, together with any or all buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, water rights, air rights, franchises, machinery, equipment, furnishings, landscaping, easements, utilities, approaches, roadways and other facilities necessary or desirable in connection with or incidental to the facilities, including the existing Dulles Airport access road and its right-of-way, acquired or constructed by the Authority.

(2) "Authority" means the Metropolitan Washington Airports Authority to be created by the legislatures of

the Commonwealth of Virginia and the District of Columbia with an agreement or compact that is consistent with the provisions of this act, or, if the Authority to be created is later abolished, the board, body, or commission or agency succeeding to the principal functions of the Authority or upon whom the powers given by this act to the Authority shall be conferred by law.

(3) "Cost" means, as applied to Authority facilities, the cost of acquisition of all lands, structures, rights of way, franchises, easements, and other property rights and interests, the cost of lease payments, the cost of construction, the cost of demolishing, removing, or relocating any buildings or structures on lands acquired, including the cost of acquiring any lands to which the buildings or structures may be moved or relocated, the cost of any extensions, enlargements, additions and improvements, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if considered advisable by the Authority, for a period not exceeding 1 year after completion of construction, the cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the Authority facilities, administrative expenses, provisions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, the cost of bond insurance and other devices designed to enhance the creditworthiness of the bonds, and other expenses necessary or incidental to the construction of the Authority facilities, the financing of this construction, and the placing of the Authority facilities in operation. Any obligation or expenses incurred by the District of Columbia ("District") or any agency of the District, with the approval of the Authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection

with the construction of the Authority facilities may be regarded as part of the cost of the Authority facilities and may be reimbursed to the District or the agency out of any funds available for these purposes or the proceeds of the revenue bonds issued for Authority facilities as authorized by this act.

(4) "Bonds" or "revenue bonds" means bonds and notes or refunding bonds and notes or bond anticipation notes or other obligations of the Authority issued under the provisions of this act.

**Sec. 3. Metropolitan Washington Airports Authority created.**

There is created the Metropolitan Washington Airports Authority, ("Authority"), a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction enumerated by this act, and other and additional powers as shall be conferred upon it jointly by the legislative authorities of the Commonwealth of Virginia and the District or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction.

**Sec. 4. Authorization of the Authority.**

The Authority created by this act is authorized, when similarly authorized by the Commonwealth of Virginia, to acquire from the United States of America, by lease or otherwise, the 2 airports known as Washington National Airport and Washington Dulles International Airport and all related properties now administered by Metropolitan Washington Airports, an agency of the Federal Aviation Administration of the United States Department of Transportation, but only with the approval of the Mayor of the District of Columbia. Subject to this mayoral approval, general consent is given to conditions imposed by the Congress of the United States on acquisitions that are not inconsistent with this act. The Mayor

shall procure the concurrence of the Council of the District of Columbia, by resolution, prior to Mayoral approval of the terms of the compact, lease or other agreements which effectuate the acquisition.

**Sec. 5. Membership; terms; officers.**

The Authority shall consist of 11 members: Five appointed by the Governor of the Commonwealth of Virginia, 3 appointed by the Mayor of the District, 2 appointed by the Governor of the State of Maryland, and 1 appointed by the President of the United States. Members representing the District shall be subject to confirmation by the Council of the District of Columbia. For the purposes of doing business, 6 members shall constitute a quorum. The failure of a single appointing official to appoint 1 or more members, as provided in this act, shall not impair the Authority's creation when the other conditions of this creation have been met.

(b) Members shall: (1) Not hold elective or appointive public office; (2) serve without compensation; and (3) reside within the Washington Standard Metropolitan Statistical Area, except that the member appointed by the President of the United States shall not be required to reside in that area. The members of the Authority shall be entitled to reimbursement for their expenses incurred in attending the meetings of the Authority or while otherwise engaged in the discharge of their duties.

(c) Appointments to the Authority shall be for a period of 6 years. However, initial appointment shall be made as follows: Each jurisdiction shall appoint 1 member for a full 6-year term, a second member for a 4-year term and in the case of the Commonwealth of Virginia and the District, a third member for a 2-year term. The Governor of Virginia shall make the final 2 Virginia initial appointments for one 2-year and one 4-year term. The President shall make initial and subsequent appointments for 6-year terms.

(d) Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

(e) Each member may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which the member is appointed.

(f) The Authority shall elect annually 1 of its members as chairman and another as vice-chairman and shall also elect annually a secretary and a treasurer, or a secretary-treasurer, who may or may not be members of the Authority, and prescribe their powers and duties. The Authority may also appoint from its staff an assistant secretary and an assistant treasurer, or an assistant secretary-treasurer, who shall, in addition to other duties, discharge the functions of the secretary and the treasurer.

(g) The members of the Authority shall continue to serve until their successors are duly appointed. Any person appointed to fill a vacancy shall serve for the unexpired term. Any member of the Authority shall be eligible for reappointment for 1 term.

(h) The members of the Authority shall not be personally liable for any act done or action taken in their capacities as members of the Authority, nor shall they be personally liable for any bond, note, or other evidence of indebtedness issued by the Authority.

#### Sec. 6. Powers and duties of the Authority.

For the purpose of acquiring, operating, maintaining, improving, promoting and protecting Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metropolitan Washington area, the Authority shall have all necessary or convenient powers including, but not limited to, the power:

(1) To adopt and amend by-laws for the regulation of its affairs and the conduct of its business;

(2) To plan, establish, operate, develop, construct, enlarge, maintain, equip, operate and protect the airports;

(3) To adopt and amend regulations to carry out the powers granted by this section;

(4) To adopt an official seal and alter this seal at its pleasure;

(5) To appoint one or more advisory committees;

(6) To issue revenue bonds of the Authority for any of its purposes, payable solely from the fees and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

(7) To borrow money on a short-term basis and issue from time to time its notes therefor payable on terms, conditions, or provisions as it may deem advisable;

(8) To fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports;

(9) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(10) To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and other employees and agents as may be necessary, and to fix their compensation and benefits. However, the Authority shall comply with any act of Congress concerning former employees of the Federal Aviation Administration and Metropolitan Washington Airports;

(11) To sue and be sued in its own name, plead and be impleaded;

(12) To construct or permit the construction of commercial and other facilities upon the airport property on terms established by the Authority and consistent with the purposes of this act;

(13) To make and enter into all contracts and agreements necessary or desirable to the performance of its duties, the proper operation of the airports and the furnishing of services to the traveling public and airport users, and these contracts shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services; or conserve airport property and the airport environment;

(14) To apply for, receive, and accept payments, appropriations, grants, gifts, loans, advances, and other funds, properties, and services as may be transferred or made available to it by the United States government or any other public or private entity or individual; and

(15) To do all acts necessary or convenient to carry out the powers expressly granted in this act.

**Sec. 7. Authority rules and regulations.**

(a) The Authority shall have the power to adopt, amend, and repeal rules and regulations pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities:

(b) Unless the Authority shall by unanimous vote of all members present determine that an emergency exists, the Authority shall, before the adoption of any rule or regulation or alteration, amendment or modification;

(1) Make the rule, regulation, alteration, amendment, or modification in convenient form available for public inspection in the office of the Authority for at least 10 days;

(2) Publish a notice in a newspaper or newspapers of general circulation in the political subdivision where the Authority's facilities are located and the District declaring the Authority's intention to consider adopting the rule, regulation, alteration, amendment, or modification and informing the public that the Authority will hold a

public hearing at which any person may appear and be heard for or against the adoption of the rule or regulation or the alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least 10 days from the day of the publication; and

(3) Hold the public hearing on the day and at the time specified in the notice or any adjournment of the hearing, and hear persons appearing for or against the rule, regulation, alteration, amendment, or modification.

(c) The Authority's rules and regulations shall be available for public inspection in the Authority's principal office.

(d) The Authority's rules and regulations relating to:

(1) Air operations and motor vehicle traffic, including but not limited to, motor vehicle speed limits and the location of and payment for public parking;

(2) Access to and use of Authority facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

(3) Aircraft operation and maintenance, shall have the force and effect of law, as shall any other rule or regulation of the Authority that shall contain a determination by the Authority that it is necessary to accord the same effect of law in the public interest; except, that, with respect to motor vehicle traffic rules and regulations, the Authority shall obtain the approval of the traffic engineer or comparable official of the political subdivision in which the rules or regulations are to be enforced. The violation of any rule or regulation of the Authority relating to motor vehicle traffic shall be tried and punished in the same manner as if it had been committed on the public roads of the political subdivisions in which the violation occurred. All other violations of the Authority's rules and regulations having the effect of law shall be punishable as misdemeanors.

**Sec. 8. Police powers.**

(a) The Authority's employees meeting the minimum requirements of the Commonwealth of Virginia's Criminal Justice Officer's Training Standards Commission may be given special police power by any of the circuit courts of the political subdivisions in which the Authority's facilities are located. The authority conferred upon these special police officers shall be exercised only upon the Authority's facilities and shall be in all terms consistent with the requirements of chapter 3 of title 15.1 of the Code of Virginia.

(b) These special police officers shall have all powers vested in police officers under chapter 3 of title 15.1 of the Code of Virginia and shall be responsible upon the Authority's facilities for enforcing the Authority's rules and regulations and all other applicable statutes, ordinances, rules, and regulations of the Commonwealth of Virginia and political subdivision, agencies, and instrumentalities of the Commonwealth of Virginia.

(c) These special police officers shall issue summonses to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any court of competent jurisdiction any person violating any rule or regulation.

(d) For the purpose of enforcing these statutes, ordinances, rules, and regulations, the court or courts having jurisdiction for the trial of criminal offenses of the political subdivisions where the offense was committed shall have jurisdiction to try a person charged with the violation of the statutes, ordinances, rules, and regulations.

**Sec. 9. Operation of foreign trade zone.**

The Authority may establish, operate, and maintain a foreign trade zone and otherwise expedite and encourage foreign commerce.

**Sec. 10. Acquisition of property; eminent domain.**

(a) The Authority may acquire by purchase, lease, or grant additional lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands as it may consider necessary or convenient for construction and operation of the airports, upon terms and at prices as may be considered by it to be reasonable and can be agreed upon between it and the owner.

(b) The District may provide services, donate real or personal property, and make appropriations to the Authority for the acquisition, construction, maintenance, and operation of the Authority facilities. The Authority may agree to assume or reimburse the District for any indebtedness incurred by the District with respect to facilities conveyed by the District to the Authority. With the consent of the Council of the District of Columbia, the agreement may be made subordinate to the Authority's indebtedness to others.

(c) The Authority is granted full power to exercise the right of eminent domain within the Commonwealth of Virginia in the acquisition of any lands, easements, privileges or other property interests that are necessary for airport and landing field purposes, including the right to acquire, by eminent domain, aviation easements over lands or water outside the boundaries of its airports or landing fields where necessary in the interests of safety for aircrafts to provide unobstructed air space for the landing and taking off of aircraft utilizing its airports and landing fields even though the aviation easement may be inconsistent with the continued use of the land, or inconsistent with the maintenance, preservation and renewal of any structure or any tree or other vegetation standing or growing on the land at the time of the acquisition. Proceedings for the acquisition of lands, easements and privileges by condemnation may be instituted and conducted

in the name of the Authority in accordance with title 25 of the Code of Virginia.

**Sec. 11. Revenue bonds.**

(a) The Authority may provide by resolution for the issuance, at 1 time or from time to time, of revenue bonds of the Authority for the purpose of paying all or any part of the cost of Authority facilities, including the refunding of federal appropriations not reimbursed to the United States Treasury by the Metropolitan Washington Airports. The principal of and the interest on these bonds shall be payable solely from the funds provided for this payment. The bonds of each issue shall be dated, shall mature at times not exceeding 40 years from their dates, as may be determined by the Authority, and may be subject to redemption or repurchase before maturity, at the option of the Authority, at prices and under these terms and conditions as may be fixed by the Authority before the issuance of the bonds. The bonds may bear interest payable at times and at rates as determined by the Authority or as determined in the manner as the Authority may provide, including the determination by agents designated by the Authority under guidelines established by it. The Authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached to the bonds, and shall fix the denominations of the bonds and the places of payment of principal and interest, which may be at any bank or trust company within or without the District of Columbia. In case any officer whose signature or a facsimile of whose signature appears on any bonds or coupons shall cease to be that officer before the delivery of the bonds, the signature or facsimile shall be valid and sufficient for all purposes the same as if the officer had remained in office until delivery. Notwithstanding any other provision of this act or any recitals in any bonds issued under the provisions of this section, all bonds shall be considered to be negotiable instruments under the laws of the District.

The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell bonds in the manner, either at public or negotiated sale, and for the price, as it may determine will best effect the purposes of this section.

(b) The proceeds of the bonds shall be used solely for the payment of the cost of Authority facilities, including improvements, and shall be disbursed in the manner and under the restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds. If the proceeds of the bonds of any issue, by error of estimates or otherwise, shall be less than the cost, additional bonds may in like manner be issued to provide the amount of the deficit, and, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds, shall be considered to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds of any issue shall exceed the cost, the surplus shall be deposited to the credit of the sinking fund for the bonds.

(c) Before the preparation of definitive bonds, the Authority may, under the same restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when the bonds have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds that become mutilated or have been destroyed or lost. Bonds may be issued under the provisions of this section without obtaining the consent of any agency of the District

and without any other proceedings, conditions or things not specifically required by this section.

**Sec. 12. Refunding bonds.**

The Authority may provide by resolution for the issuance of its revenue refunding bonds for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, including the payment of any redemption premium on the bonds and any interest accrued or to accrue to the date of redemption of the bonds, and if considered advisable by the Authority, for either or both of the following additional purposes: constructing improvements, extensions or enlargement of the Authority facilities in connection with which the bonds to be refunded shall have been issued; and, paying all or any part of the cost of any additional Authority facilities. The issuance of bonds, the maturities, and other details of the issuance, the rights of the holders of the bonds, and the rights, duties and obligations of the Authority in respect to the bonds, shall be governed by the provisions of this act insofar as this act may be applicable. Revenue refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this act and, if sold, the proceeds of the bonds may be applied to the purchase, redemption, or payment of outstanding bonds.

**Sec. 13. Pledge of funds.**

All monies received pursuant to the provisions of this act, whether as proceeds from the sale of bonds, as revenues, or as grants, appropriations, or other funds provided by federal, state, or local governments, may be pledged to the payment of bonds issued by the Authority and, if so pledged, shall be considered to be trust funds to be held and applied solely as provided in this act.

**Sec. 14. Marketability of bonds.**

The Authority may exercise all or any part of combination of the powers granted by this act, including the

power: To make covenants other than and in addition to the covenants expressly authorized, of like, or different character; to make covenants and to do all acts as may be necessary, convenient, or desirable in order to secure its bonds or, in the absolute discretion of the Authority, as will tend to make the bonds more marketable, notwithstanding that the covenants or acts may not be enumerated in this act.

**Sec. 15. Bonds as legal investments and security for public deposits.**

Bonds issued by the Authority under the provisions of this act are securities in which all public officers and public bodies of the District, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. These bonds are securities that may properly and legally be deposited with and received by any municipal officer or any agency of the District for any purpose for which the deposit of bonds or obligations is now or may subsequently be authorized by law.

**Sec. 16. Credit of the District not pledged.**

Revenue bonds issued under the provisions of this act shall not constitute a debt of the District nor a pledge of the faith and credit of the District. The bonds shall be payable solely from funds provided for the bonds from revenues. The issuance of revenue bonds under the provisions of this act shall not directly, indirectly, or contingently obligate the District to any form of taxation whatever. All revenue bonds shall contain a statement on their face substantially to this effect.

**Sec. 17. Trust agreement.**

In the discretion of the Authority any bonds issued under the provisions of this act may be secured by a

trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the power of a trust company within or without the District. The trust agreement or the resolution providing for the issuance of the bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the airports or any part of the airports. The trust agreement or resolution providing for the issuance of the bonds may contain provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition of property and the construction, improvement, maintenance, repair, operation and insurance of the airports, the rates or fees or other charges to be charged, and the custody, safeguarding the application of all monies. It shall be lawful for any bank or trust company incorporated under the laws of the District that may act as depositary of the proceeds of bonds or of revenues to furnish indemnifying bonds or to pledge securities as may be required by the Authority. Any trust agreement may set forth the rights and remedies of the bondholders. In addition, any trust agreement or resolution may contain other provisions the Authority considers reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of the trust agreement or resolution may be treated as a part of the cost of the operation of the airports.

#### Sec. 18. Revenues.

The Authority may fix, revise, charge, and collect fees or other charges for the use of the airports, contract with any person, partnership, association, or corporation desiring the use of any part of the airports, including the right-of-way adjoining the airports for placing on the airports telephone, telegraph, electric light or power

lines, and fix the terms, conditions, rents and fees or other charges for use. Fees or other charges shall be so fixed and adjusted in respect of the aggregate of fees or other charges from the airports as to provide a fund sufficient with other revenues, if any, (1) to pay the cost of maintaining, repairing and operating the airports, (2) to pay the principal of and interest on bonds as they become due and payable, and (3) to create reserves for these purposes. The fees and other charges and all other revenues derived from the airports, except the part as may be necessary to pay the cost of maintenance, repair, and operation and provide reserves as may be provided for in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds, shall be set aside at regular intervals as may be provided in the resolution or the trust agreement in a sinking fund, which is pledged to, and charged with, the payment of the principal of and the interest on the bonds as they become due, and the redemption price or the purchase price of bonds retired by call or purchase as provided in the bonds. The pledge shall be valid and binding from the time when the pledge is made. The fees, other charges, and other revenues or other monies so pledged and subsequently received by the Authority shall immediately be subject to the lien of the pledge without any physical delivery of the lien or further act, and the lien of the pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether the parties have notice of the lien. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of monies to the credit of the sinking fund shall be subject to the provisions of the resolution authorizing the issuance of the bonds or of the trust agreement. Except as may otherwise be provided in the resolution or the trust agreement, the sinking fund shall be a fund for

all these bonds without distinction or priority of 1 over another.

**Sec. 19. Trust funds.**

All proceeds from the sale of bonds and revenues derived from the bonds received pursuant to the provisions of this act shall be considered to be trust funds to be held and applied solely as provided in this Act. The Authority may, in the resolution authorizing the bonds or in the trust agreement securing the bonds, provide for the payment of the proceeds of the sale of the bonds and the revenues of the Authority to a trustee, which may be any trust company or bank having the powers of a trust company within or without the District, which shall act as trustee of the funds, and hold and apply the funds to the purposes of this act, subject to any regulations this act and the resolution or trust agreement may provide. The trustee may invest and reinvest the funds in securities as may be provided in the resolution authorizing the bonds or in the trust agreement securing the bonds.

**Sec. 20. Annual audit.**

The Authority shall prepare financial statements at the end of each of its fiscal years in conformity with generally accepted accounting principles. These financial statements shall be examined annually by an independent certified public accountant in accordance with generally accepted auditing standards. Copies of each audit report shall be furnished to the Governor of the Commonwealth of Virginia and to the Mayor of the District not later than 120 days after the end of each fiscal year of the Authority and shall be open to public inspection.

**Sec. 21. Remedies.**

Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining to the bonds, and the trustee under any trust agreement, except to the extent the rights given by this act, may be restricted by

the trust agreement, may either at law or in equity, by suit, action, injunction, mandamus or other proceedings, protect and enforce any and all rights under the laws of the District, or granted by this act or under the trust agreement or the resolution authorizing the issuance of the bonds and may enforce and compel the performance of all duties required by this act or by the agreement or resolution to be performed by the Authority or by any officer or agent of the Authority including the fixing, charging, and collection of fees or other charges.

**Sec. 22. Exemption from taxation.**

The exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the District for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience, and prosperity, and as the operation and maintenance of the airports by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon the airports or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom; and the bonds issued under the provisions of this act, their transfer and the income from the bonds, including any profit made on the sale of the bonds, shall at all times be free and exempt from taxation by the District.

**Sec. 23. Jurisdiction of courts; liability for contracts and torts.**

(a) The courts of the Commonwealth of Virginia shall have original jurisdiction over all actions brought by or against the Authority, which courts shall in all cases apply the law of the Commonwealth of Virginia.

(b) The Authority shall be liable for its contracts and for its torts and those of its members, officers, employees, and agents committed in the conduct of any proprietary function, in accordance with the law of the Com-

monwealth of Virginia but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for breach of contracts and torts for which the Authority shall be liable, as provided by this act, shall be by suit against the Authority. Nothing in this act shall be construed as a waiver by the District or the Commonwealth of Virginia or its political subdivisions of any immunity from suit.

(c) The Authority shall be responsible for all executory contracts entered into by the United States with respect to the former Metropolitan Washington Airports before the date of acquisition of those airports, except that the procedure for disputes resolution contained in any contract shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract.

(d) The Authority shall not be responsible for any tort claims arising before the date of transfer.

**Sec. 24. Procurement exemption.**

In light of the multi-jurisdictional nature of the Authority, an exemption is provided to the Authority from all laws and regulations of the District governing public procurement.

**Sec. 25. Act liberally construed.**

This Act, being necessary for the welfare of the District and its inhabitants, shall be liberally construed to effect its purposes.

**Sec. 26. Constitutional construction.**

The provisions of this act are severable and if any of its provisions are held unconstitutional by any court of competent jurisdiction, the decision of that court shall not affect or impair any of the remaining provisions of this act. It is declared to be the legislative intent that this act would have been adopted had any unconstitutional provisions not been included.

**Sec. 27. Inconsistent laws inapplicable.**

All other general or special laws inconsistent with any provision of this act are declared to be inapplicable to the provisions of this act.

**Sec. 28. Effective date.**

This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of vote by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)), and upon the enactment into law by the Congress of the United States of legislation that authorizes and directs the sale, lease, or other disposition of the Metropolitan Washington Airports to an Airports Authority created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that is consistent with the provisions of this act, whichever occurs later.

/s/ David A. Clarke  
Chairman  
Council of the District of Columbia

/s/ Marion Barry  
Mayor  
District of Columbia

APPROVED: October 9, 1985

## COUNCIL OF THE DISTRICT OF COLUMBIA

## NOTICE

D.C. Law 7-18

"District of Columbia Regional Airports Authority Act of 1985 Amendment Act of 1987".

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, "the Act", the Council of the District of Columbia adopted Bill No. 7-172 on first and second readings, April 14, 1987, and May 5, 1985, respectively. Following the signature of the Mayor on June 1, 1987, this legislation was assigned Act 7-32, published in the June 12, 1987, edition of the *D.C. Register*, (Vol. 34 page 3804) and transmitted to Congress on June 10, 1987, for a 30-days review, in accordance with Section 602(c)(1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C. Law 7-18, effective July 25, 1987.

/s/ David A. Clarke  
 DAVID A. CLARKE  
 Chairman of the Council

*Dates Counted During the 30-day Congressional Review Period:*

June 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30  
 July 1, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24

## AN ACT

D.C. ACT 7-32

## IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Jun. 01, 1987

To amend the District of Columbia Regional Airports Authority Act of 1985 to conform with legislation passed by the legislature of the Commonwealth of Virginia and by the United States Congress, to authorize the Metropolitan Washington Airports Authority to establish a board of review, and to establish civil penalties for violations of rules of the Metropolitan Washington Airports Authority.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Regional Airports Authority Act of 1985 Amendment Act of 1987".

## Sec. 2. Findings.

The Council of the District of Columbia ("Council") finds that:

(1) Congress adopted the Metropolitan Washington Airports Act of 1986, approved October 30, 1986 (100 Stat. 3341; 49 U.S.C. app. 2456) ("Airports Act"), which authorized the transfer of operating responsibility of Washington Dulles International Airport and Washington National Airport to a local authority under a 50-year lease.

(2) Section 6007 of the Airports Act requires that the powers and jurisdiction of the Metropolitan Washington Airports Authority be conferred jointly by the legislative

authority of the Commonwealth of Virginia and the District of Columbia or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction.

(3) The Council adopted legislation in 1985 which conformed to the original Virginia Statute authorizing a local authority, and it is therefore appropriate to adopt amendments in conformity with amendments recently approved by the legislature of the Commonwealth of Virginia in S. 672, 169 Leg., 1987 Sess. (1987) in response to the Airports Act.

Sec. 3. The District of Columbia Regional Airports Authority Act of 1985, effective December 3, 1985 (D.C. Law 6-67; D.C. Code, sec. 7-1101 note) ("District act"), is amended as follows:

(a) Section 2 is amended by striking in paragraph (2) the phrase "to be created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that is consistent with the provisions of this act, or, if the Authority to be created is later abolished," and inserting in its place the phrase "created by this act and by similar enactment by the Commonwealth of Virginia, or if the Authority is abolished".

(b) Section 5(h) is amended to read as follows:

"(h) The members of the Authority and its board of review, including any nonvoting members, shall not be personally liable for any act done or action taken in their capacities as members of the Authority or its board of review, nor shall they be personally liable for any bond, note, or other evidence of indebtedness issued by the Authority."

(c) Section 6 is amended:

(1) By striking from paragraph (2) the second appearance of the word "operate";

(2) By inserting in paragraph (5) after the word "committees" the phrase "and to establish a board of review";

(3) By striking from paragraph (10) the phrase "However, the" and inserting in its place the phrase "Employees of the Authority shall not participate in any strike or assert any right to strike against the Authority, and any employment agreement entered into by the Authority shall contain an explicit prohibition against strikes by the employee or employees covered by such agreement. The";

(4) By inserting in paragraph (12) after the word "facilities" the phrase "consistent with the purposes of this act", and by striking from paragraph (12) after the word "Authority" the phrase "and consistent with the purposes of this act";

(5) By inserting in paragraph (13) after the word "users," the phrase "including contracts for normal governmental services on a reimbursable basis with local political subdivisions where the Authority facilities are situated and with the District of Columbia government,";

(6) By striking at the end of paragraph (14) the word "and";

(7) By adding a new paragraph (15a) to read as follows:

"(15a) To make payments to reimburse the local political subdivisions where the Authority facilities are situated for extraordinary law enforcement costs incurred by such localities; and"; and

(8) By adding a new subsection (a-1) to read as follows:

"(a-1) Pursuant to section 6007(b) of the Metropolitan Washington Airports Act of 1986, approved October 30, 1986 (100 Stat. 3341; 49 U.S.C. app. 2456), the

Authority is established solely to operate and improve both metropolitan Washington airports as primary airports serving the metropolitan Washington area and shall be independent of the Commonwealth of Virginia and its local political subdivisions, the District of Columbia, and the federal government in the performance and exercise of the airport-related duties and powers enumerated in this section. Any conflict between the exercise of these enumerated powers by the Authority and the powers of any local political subdivision within which Authority facilities are situated shall be resolved in favor of the Authority.”.

(d) Section 7 is amended:

(1) By striking in paragraph (b)(2) the phrase “in the political subdivision where the Authority's facilities are located and the District” and inserting in its place the phrase “in the District of Columbia and in the local political subdivisions of the Commonwealth of Virginia where the Authority facilities are located”;

(2) By striking in subsection (d) the last sentence; and

(3) By adding new subsections (e), (f), (g), (h), and (i) to read as follows:

“(e) The violation of any rule or regulation of the Authority establishing a noise limitation on aircraft that operate at the Authority Facilities shall subject the violator, in the discretion of the circuit court of any political subdivision where the facility is located to a civil penalty not to exceed \$2,500 for each violation. The penalty shall be paid to the Authority. With the consent of the violator or the accused violator of a rule establishing aircraft noise limits, the Authority may provide, in an order issued against the violator or accused violator, for the payment of civil charges in specific sums not to exceed the limit that could be imposed by the court. Such civil charge when paid shall be in lieu of any civil pen-

alty that could be imposed by the court. Any court proceeding shall be within the exclusive jurisdiction of the circuit court and shall be a civil proceeding at law brought by the Authority.

“(f) The violation of any Authority rule or regulation, having the force and effect of law, shall be a Class 1 misdemeanor unless otherwise specified by chapter 598 of the 1985 Acts of Assembly or unless a lesser penalty is set by the Authority in the rule or regulation. The rules of criminal procedure and evidence that apply throughout the Commonwealth of Virginia (“Commonwealth”) shall apply to the adjudication of any case involving the violation of any Authority rule or regulation having the force and effect of law.

“(g) The courts of the Commonwealth shall take judicial notice of the Authority's regularly adopted rules and regulations. For the convenience of the courts which may regularly hear cases arising under the Authority's rules and regulations, the Authority may certify to the clerk of such court a copy of its rules and regulations. Any such certification, when signed by the chairman of the Metropolitan Washington Airport Authority, shall be accepted as evidence of the facts therein stated.

“(h) With respect to the violation of any statute of the Commonwealth, local ordinance, or Authority rule or regulation having the force and effect of law occurring at the Authority Facilities:

“(1) The matter shall be within the jurisdiction of the state courts of the political subdivision where the violation occurred; violations occurring at Washington National Airport shall be within the jurisdiction of the courts for Arlington County;

“(2) The attorney for the Commonwealth shall have authority to prosecute those offenses in the name of the Commonwealth or local government as appropriate; and the county or city attorney, if otherwise authorized to

prosecute offenses in the name of the county or city, shall have authority to prosecute those offenses in the name of the county or city; and

"(3) Sheriffs and clerks of the court shall provide those same services and exercise those same powers with respect to Authority Facilities within their jurisdiction as for their political subdivisions.".

(e) Section 8 is amended to read as follows:

**"Sec. 8. Police powers.**

"(a) The Authority is authorized to establish and maintain a regular police force and to confer police powers to be exercised with respect to offenses occurring on the Authority Facilities upon its employees meeting the minimum requirements of the Commonwealth of Virginia's Department of Criminal Justice Services.

"(b) Such police officers shall have all powers vested in police officers under Chapter 3 of Title 15.1, Chapter 11 of Title 16.1, Title 18.2, and Title 46.1 of the Code of Virginia and shall be responsible upon the Authority Facilities and within 300 yards of the Facilities for enforcing the laws of the Commonwealth, the Authority's rules and regulations, and all other applicable ordinances, rules, and regulations.

"(c) The police officers may issue summons to appear, or arrest on view or on information without warrant as permitted by law, and conduct before any judicial officer of competent jurisdiction any person violating, upon Authority Facilities, any rule or regulation of the Authority, any ordinance or regulation of any local political subdivision, or any other law of the Commonwealth.

"(d) The Department of State Police shall exercise the same powers upon Authority Facilities as elsewhere in the Commonwealth.

"(e) The Authority may enter into reciprocal or mutual aid agreements with the local political subdivisions

in which the Authority Facilities are situated, any agency of the Commonwealth, or of the federal government, or any combination of the foregoing, for cooperation in the furnishing of police services.

"(f) The police force of Arlington County shall have concurrent jurisdiction with the police force established herein at Washington National Airport. The Authority shall enter into an agreement with Arlington County regarding the exercise of police authority.

"(g) The sheriffs and police forces of Loudon and Fairfax Counties shall continue to exercise concurrent jurisdiction with the police force established herein over the Authority Facilities situated within their respective counties.".

(f) Section 28 is amended by striking the phrase "an Airports Authority created by the legislatures of the Commonwealth of Virginia and the District pursuant to an agreement or compact that consistent with the provisions of this act, whichever occurs later.", and inserting in its place the phrase "the Authority.".

Sec. 4. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

/s/ David Clarke  
Chairman  
Council of the District of Columbia

/s/ Marion Barry  
Mayor  
District of Columbia  
Approved: June 1, 1987

BYLAWS  
of the  
METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY

As Constituted and Accepted by Vote of the  
Board of Directors on March 4, 1987

ARTICLE I

Organization of the Authority

**Section 1. *Board of Directors.*** Pursuant to Chapter 598, 1985, Virginia Acts of Assembly and the Regional Airports Authority Act of 1985, D.C. Law 6-67, all powers, rights and duties conferred upon the Metropolitan Washington Airports Authority shall be vested in a Board of Directors, hereinafter referred to as the "Board." Individual Members of the Board shall be referred to as "Directors."

a. There shall be eleven Directors: five appointed by the Governor of the Commonwealth of Virginia, three appointed by the Mayor of the District of Columbia, two appointed by the Governor of the State of Maryland, and one appointed by the President of the United States.

b. Directors shall (i) not hold elective or appointive public office, (ii) serve without compensation except that the Directors shall be entitled to reimbursement of their expenses incurred in attendance upon the meetings of the Authority or while otherwise engaged in the discharge of their duties, and (iii) reside within the Washington Standard Metropolitan Statistical Area, except

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that the Director appointed by the President of the United States shall not be required to reside in that area.

c. Appointments to the Authority shall be for a period of six years. However, initial appointments shall be made as provided by law.

d. Each Director may be removed or suspended from office only for cause, and in accordance with the laws of the jurisdiction from which he is appointed.

e. The Directors of the Authority shall continue to serve until their successors shall be duly appointed and qualified. Any person appointed to fill a vacancy shall serve for the unexpired term. Any Director of the Authority shall be eligible for reappointment for one term.

**Section 2. *Officers.*** The Board shall annually elect from its membership a Chairperson and Vice-Chairperson and may elect from its membership, or appoint or employ from its staff, a Secretary and a Treasurer or a Secretary/Treasurer, and prescribe the powers and duties of each officer, and it may appoint from the staff an Assistant Secretary and an Assistant Treasurer, or an Assistant Secretary/Treasurer, who shall, in addition to other duties, discharge such functions of the Secretary and Treasurer, respectively, as may be directed by the Board.

**Section 3. *Term of Office.*** All officers, as long as they continue to serve as a Director or staff, shall hold office until the next annual meeting of the Board, or until their successors are elected or appointed and qualified, whichever may be the later.

ARTICLE II

Duties of the Board

The Board shall provide direction to the Authority in order to acquire, maintain, develop, promote and protect Washington National and Washington Dulles Interna-

tional Airports. The Board shall promote good air transportation facilities with timely improvements at both airports. The Board shall see that the laws pertaining to the purposes and functions of the Authority are faithfully observed and executed. The Board will employ staff and adopt appropriate procedures to carry out those duties.

### ARTICLE III

#### Powers and Duties of the Officers of the Board

**Section 1. *The Chairperson.*** The Chairperson shall preside at all meetings of the Board; shall appoint all Committees and the Chairpersons thereof; shall serve as an ex officio member of all committees; shall execute documents on behalf of the Authority as prescribed by the Board and shall perform such other duties as the Board may from time to time direct.

**Section 2. *Vice-Chairperson.*** The Vice-Chairperson shall perform the duties and have the powers of the Chairperson during the absence or incapacity of the Chairperson from any cause. A certification by any six Directors as to such absence or incapacity from any regular or special meeting shall be conclusive evidence thereof.

**Section 3. *Secretary.*** The Secretary shall be the custodian of all records and of the Seal of the Authority and shall keep accurate minutes of the meetings of the Board. The Secretary shall have the authority to cause copies to be made of all minutes and other records and documents of the Authority and to certify under the official seal of the Authority that such copies are true copies. The Secretary shall affix the Seal of the Authority to legal instruments and documents as required. Secretary shall cause notice to be given to all meetings of the Authority as required by law or by these Bylaws and distribute the agenda and related materials not less than 48 hours before the regular meetings of the Board. The Secretary, if a Director, shall become, ex officio, the Act-

ing Chairperson in the event the offices of Chairperson and Vice-Chairperson are both vacant, or in the event that the Chairperson and the Vice-Chairperson are both unable to perform their duties by reason of absence or incapacity.

**Section 4. *Treasurer.*** Except as may be required in any instrument under which any revenue or other bonds are issued by the Authority, the Treasurer shall have the care and custody of and shall be responsible for all monies of the Authority from whatever sources received. The Treasurer shall be responsible for the deposit of such monies in the name of the Authority in a bank or banks approved by the Board and shall be responsible for the disbursements of such funds for purposes authorized or intended by the Board. The Treasurer, and any Assistant Treasurer, shall be bonded in an amount and with surety acceptable to the Board and shall make periodic accountings for all such funds as determined by the Board. The Treasurer's books shall be available for inspection by any Director of the Board during business hours.

**Section 5. *Other Duties.*** In addition to the duties and powers herein set forth, the Chairperson, the Vice Chairperson, the Secretary and the Treasurer shall each have the duties and powers as are commonly incident to their offices and such duties as may be imposed by law or as the Authority may from time to time by resolution specify.

### ARTICLE IV

#### Board of Review

**Section 1. *Establishment and composition.*** The Board of Directors shall establish a nine-member Board of Review of the Airports Authority and appoint to it representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities. The Board of Directors shall appoint:

a. Two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the U.S. House of Representatives from a list or lists of recommended appointees provided by the Speaker of the House;

b. Two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the U.S. Senate from a list or lists of recommended appointees provided by the President pro tempore of the U.S. Senate; and

c. One member chosen alternately from a list provided by the Speaker of the house or the President pro tempore of the Senate, respectively.

The Board of Directors may not appoint a member of the House of Representatives or the Senate from Maryland or Virginia, or the Delegate from the District of Columbia, to the Board of Review. The members of the Board of Review shall elect a chairman.

**Section 2. Terms.** Members of the Board of Review appointed as provided above shall be appointed for six years, except that of the members first appointed, one member under each of paragraphs (a) and (b) of Section 1 shall be appointed for a term of two years and one member under each of paragraphs (a) and (b) of Section 1 shall be appointed for a term of four years. Members of the Board of Review appointed under paragraph (c) of Section 1 shall be appointed for terms of two years. The Board shall fill a vacancy in the Board of Review in the same manner in which the original appointment was made. Any member appointed to fill a vacancy before the expiration of the term of which his or her predecessor was appointed shall be appointed only for the remainder of such term.

**Section 3. Procedures.** The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meet-

ings and for voting by proxy. Proxies may only be given to other members of the Board of Review. The Board shall meet at least once each year and shall meet at the call of its chairman or three of its members of the Board. Also, the Board of Directors may call, with at least one week's notice, meetings of the Board of Review. Any decision of the Board of Review under sections 4 or 5 shall be by vote of five members.

**Section 4. Approval procedure.** The Board of Directors shall submit the following actions to the Board of Review at least thirty (30) days (or at least sixty (60) days in the case of the annual budget) before they are to become effective:

- a. the adoption of an annual budget;
- b. the authorization for the issuance of bonds;
- c. the adoption, amendment, or repeal of a regulation;
- d. the adoption or revision of a master plan, including any proposal for land acquisition; and
- e. the appointment of the chief executive officer.

If the Board of Review does not disapprove an action within thirty (30) days of its submission the action may take effect. If the Board of Review disapproves any such action, it shall notify the Board of Directors and shall give reasons for the disapproval. An action disapproved under this paragraph shall not take effect.

**Section 5. Effect of disapproval.** Unless an annual budget for a fiscal year has taken effect in accordance with section 4, the Airports Authority shall not obligate or expend any money in such fiscal year, except for (1) debt service on previously authorized obligations, and (2) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

**Section 6. Request for consideration for other matters.** The Board of Review may request the Board of Directors

to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Board of Directors will consider and vote, or report, on the matter as promptly as feasible.

*Section 7. Participation in meetings of the Airports Authority.* Members of the Board of Review may participate as nonvoting members in meetings of the Board of Directors.

*Section 8. Staff.* The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports Authority shall provide such clerical and support staff as the Board of Review may require. The staff shall be employees of the Airports Authority.

*Section 9. Limitation on Board actions.* If the Board of Review is unable to function as described in this Article by reason of a judicial order, the Board of Directors may continue to take all actions other than those which must be submitted to the Board of Review under section 4 above.

## ARTICLE V

### Chief Executive Officer, and Other Employees

*Section 1. Chief Executive Officer.* The Board shall appoint a Chief Executive Officer who shall be the Chief Executive Officer of the Authority. He or she shall, except as otherwise provided by the Board, be in charge of management and all operations of the airports and any other activities of the Authority as prescribed by the Board. The Chief Executive Officer shall sign documents on behalf of the Authority as prescribed by the Board. The Chief Executive Officer shall discharge his or her duties as directed by the Board.

*Section 2. Employees.* The Chief Executive Officer shall present the Board with a plan for staffing the airports. All selections for positions reporting directly to

the Chief Executive Officer shall be subject to approval by the Board.

## ARTICLE VI

### Offices, Books and Records

*Section 1. Offices.* The Board shall establish the principal office of the Authority at Washington National Airport or Washington Dulles International Airport.

*Section 2. Books and Records.* Except as may be otherwise required or permitted by resolution of the Board, or as the business of the Authority may from time to time require, all of the books and records of the Authority shall be kept at its principal office. Such books and records shall be available during ordinary business hours for inspection by any member of the public.

*Section 3. Minutes.* All approved minutes of Board meetings other than those of an executive session shall be open to public inspection during ordinary business hours.

## ARTICLE VII

### Meetings of the Board

*Section 1. Regular Meetings.* A regular meeting of the Board shall be held without call or formal notice at the principal office of the Authority on the first Wednesday of every month at 9 a.m., except that in any case in which such day shall be a legal holiday, or for any other reason inappropriate as a meeting day, the regular meeting shall be held on such other day as may be determined by at least six (6) Directors after consultation with all of the Directors and upon the provision of seventy-two (72) hours notice to the Secretary. The Secretary shall notify all of the Directors upon receipt of such notice.

*Section 2. Annual Meeting.* The regular meeting held in the month of September in each year shall be the annual meeting for the election of a Chairperson, Vice-

Chairperson, Secretary and a Treasurer. If the annual meeting is omitted, a special meeting shall be held in lieu thereof as soon as practicable, and all elections held and action taken thereat shall have the same effect as if held or taken at the annual meeting.

**Section 3. Special Meetings.** Special meetings may be called at any time by the Chairperson. Upon receipt of a written request for a special meeting from any six (6) Directors, the Chairperson must call a meeting. Written notice of each special meeting, specifying the time and place of the meeting, and the purpose or purposes of the meeting, shall be given to the Directors by the Secretary. Notice shall be deemed sufficient if sent by mail at least seventy-two (72) hours in advance of the date and time of the meeting or by telegram or otherwise in writing within twenty-four (24) hours before the time of the meeting, if given to the Directors in person. Formal notice to any person shall not be required provided all Directors are present or those not present shall have waived notice in writing, filed with the records of the meeting, either before or after the meeting.

**Section 4. Information.** Information as to the time and place of each meeting shall be furnished to any person who requests such information. Requests to be notified on a continual basis shall be made at least once a year in writing.

## ARTICLE VIII

### Quorum

**Section 1. Quorum.** Six Directors shall constitute a quorum for the transaction of all business.

**Section 2. Majority Voting.** Action by the Board shall be by a simple majority vote of the Directors present and voting except where otherwise provided by the Bylaws. Seven affirmative votes shall be required to approve bond issues and the annual budget of the Authority.

## ARTICLE IX

### Transaction of Business

**Section 1. Regular and Special Meetings.** Any business of the Authority may be considered at any regular meeting of the Authority. Only items of business identified in the agenda distributed by the Secretary forty-eight (48) hours in advance of the meeting may be acted upon at a regular meeting. Other matters may be acted upon if a majority of the Board of Directors votes to waive this notice provision. When notice of a special meeting is sent, only matters specified or described in the notice may be considered at the special meeting, except that with the unanimous consent of the Directors present any other matter be considered.

**Section 2. Order of Business.** Unless waived by a vote of six or more Directors, the order of business at a meeting of the Board shall be:

- a. Approval of the minutes of the previous meeting.
- b. Report of Chief Executive Officer and staff.
- c. Unfinished business.
- d. New business.
- e. Other business and adjournment.

**Section 3. Executive Session.** All regular and special meetings of the Board shall be open to the public except that at any time a majority of the Directors present may affirmatively vote to consider a matter or matters in the categories described below in executive session which will be closed to the public. Any motion to meet in executive session must identify in general terms the subject or subjects to be considered and identify the subsection below under which the executive session is authorized. The following items or matters may be considered and acted upon by the Board, and appropriate officers and staff, in the executive session:

a. Personnel matters such as the discussion or consideration of: Employment, appointment, assignment, promotion, demotion, performance appraisal, discipline, resignation, salaries and benefits, and interviews of Directors, officers, and employees of the Authority, and applicants for the same.

b. Personal matters not directly related to the Authority's business in order to protect the privacy of individuals.

c. Discussion of existing, or prospective, contracts, business or legal relationships to protect proprietary or confidential information of any person or company, the financial interest of the Authority, or the negotiating position of the Authority.

d. The investing of Authority funds where competition or negotiation is involved to protect the financial interests of the Authority or the negotiating position of the Authority.

e. Consultation with legal counsel and briefings by staff, consultants and/or attorneys, pertaining to actual or potential litigation, pending or proposed legislation, compliance with a specific constitutional, statutory or judicially imposed requirement, or other legal matters, and discussions of such matters by the Board without the presence of counsel, staff, consultants, or attorneys.

**Section 4. Actions in Executive Session.** No resolution, contract, or motion, adopted, passed or agreed to in an executive session, other than a request to the staff for information, shall become effective unless the Board, at an appropriate time following such session, reconvenes in public or open session and takes a vote of the Directors on such resolution, contract, or motion and the subject of the resolution, contract, or motion shall be reasonably identified in the open session. This shall not be construed to require the Board to divulge information that is proprietary or actions which are not final.

**Section 5. Other Business.** After completion of the agenda, the Chairperson, Directors, or the Chief Executive Officer may, for information purposes, place any matter or matters on the agenda or other business which they deem to require the attention of the Board.

**Section 6. Procedure.** Roberts Rules of Order, as amended, shall be the authority for all matters of procedure not otherwise covered by these Bylaws. A point of order as to procedure raised by any Director in the course of a regular or special meeting shall be resolved by a ruling of the Chairperson. The vote of a majority of the Directors present shall be required to overrule the Chairperson.

## ARTICLE X

### Directives and Regulations

**Section 1. General.** The Board will adopt, amend and repeal as necessary: 1) internal directives and procedures for operating the airports, including delegations of authority, and 2) regulations which may have the force and effect of law, pertaining to the use, maintenance and operation of its facilities and governing the conduct of persons and organizations using its facilities.

**Section 2. Regulatory procedure.** Unless the Board determines that an emergency exists by unanimous vote of all Directors present, the Board shall, prior to the adoption of any regulation or alteration, amendment, or modification thereof:

a. Make such regulation or amendment thereof in convenient form available for public inspection in the office of the Authority for at least ten days.

b. Publish a notice in a newspaper or newspapers of general circulation in the District of Columbia, Montgomery County and Prince George's County, Maryland, and in the local political subdivisions of the Common-

wealth of Virginia where the Authority facilities are located declaring the Authority's intention to consider adopting such regulation or amendment thereof and informing the public that the Authority will hold a public hearing at which any person may appear and be heard for or against the adoption of such regulation or such alteration, amendment, or modification, on a day and at a time to be specified in the notice, after the expiration of at least ten days from the day of the publication thereof; and

c. Hold the public hearing, or appoint a hearing officer to hold a public hearing, on the day and at the time specified in such notice or any adjournment thereof, and hear persons appearing for or against such regulation or amendment thereof.

d. In accordance with the Metropolitan Washington Airports Act of 1986, adoption by the Board of the regulations of the Federal Aviation Administration which govern the airports at the time the airports are transferred to the Authority shall not be subject to this procedure.

**Section 3. Inspection of regulations.** The Authority's regulations shall be available for public inspection in the Authority's principal office.

**Section 4. The Authority's regulations relating to**

a. Air operations and motor vehicle traffic, including, but not limited to, motor vehicle speed limits and the location of and payment for public parking;

b. Access to and use of Authority Facilities, including but not limited to solicitation, handbilling, picketing and the conduct of commercial activities; and

c. Aircraft operation and maintenance;

shall have the force and effect of law, as shall any other regulation of the Authority which shall contain a determination by the Authority that it is necessary to accord

the same force and effect of law in the public interest; provided, however, that with respect to motor vehicle traffic rules and regulations, the Board will obtain the approval of the traffic engineer or comparable official of the local political subdivision in which such rules or regulations are to be enforced.

Section 5. The Board shall establish the effective date of its regulatory actions consistent with Article IV of these bylaws.

## ARTICLE XI

### Miscellaneous

**Section 1. Code of Ethics.** The Board shall adopt a code of ethics and financial disclosure to assure the integrity of all decisions by the Board, its Board of Review, and employees of the Authority. The code shall provide that each Director and his/her immediate families may not hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an aeronautical, aviation services, or airport services enterprise that otherwise has interests that can be directly affected by the Airports Authority. Exceptions may be made if the financial interest is fully disclosed to the Board and the Director does not participate in Board decisions that directly affect such interest.

**Section 2. Indemnity.** The Authority shall indemnify each Director and Officer against all costs and expenses (including counsel fees) actually incurred by him in connection with or resulting from any action, suit or proceeding, of whatever nature, to which he is or shall be made a party by reason of his being or having been a Director or Officer of the Authority, provided 1) that the Director or Officer conducted himself in good faith and 2) reasonably believed that his conduct was in the best interest of the Authority. This indemnity shall not apply

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in actions when the Director or Officer is adjudged liable to the Authority.

Section 3. *Minority participation.* The Board shall develop and adopt a policy for providing minority participation in the contracts of the Authority.

## ARTICLE XII

### Amendments

These Bylaws may be amended or repealed in whole or in part by resolution of the Board adopted by at least seven (7) Directors at any regular meeting or special meeting, provided that notice of intention to present such resolution shall be given to all Directors at least two (2) days in advance of the meeting at which the motion to adopt such resolution is to be made. Such notice shall be given by any Director, or by the Secretary at the request of any Directors, and shall specify the subject matter of the proposed amendment or repeal. The notice of intention to amend or repeal these Bylaws shall include a specific reference to the Article subject to the proposed amendment or repeal, together with the suggested change.

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LEASE

of the

METROPOLITAN WASHINGTON AIRPORTS

between

THE UNITED STATES OF AMERICA

acting by and through

THE SECRETARY OF TRANSPORTATION

and

THE METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY

ENTERED INTO AT WASHINGTON,  
DISTRICT OF COLUMBIA

THIS SECOND DAY OF MARCH,  
1987

[In Relevant Part]

**AGREEMENT  
AND DEED OF LEASE**

March 2, 1987

Agreement and Deed of Lease between the United States of America, acting by and through the Secretary of Transportation ("the Secretary"), and the Metropolitan Washington Airports Authority ("the Airports Authority"), a public body politic and corporate created by compact between the Commonwealth of Virginia and the District of Columbia with the consent of the Congress.

WHEREAS, in the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591 ("the Act"), the Congress declared its purpose to be to authorize the transfer of operating responsibility under a long-term lease of the Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, to a properly constituted independent airport authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets;

WHEREAS, the Act authorized the Secretary to enter into such a lease in order to enable the financing of badly needed capital improvements;

WHEREAS, in Chapter 598, Virginia Acts of Assembly, 1985, as it may be amended, and in the District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67, as it may be amended, the Commonwealth of Virginia and the District of Columbia, respectively, enacted essentially identical laws to create the Airports Authority to acquire the Metropolitan Washington Airports from the United States, by lease or otherwise;

WHEREAS, the Congress has found that the two federally owned airports in the metropolitan area of Washington, District of Columbia constitute an important and

growing part of the commerce, transportation and economic patterns of the Commonwealth of Virginia, the District of Columbia, and the surrounding region;

WHEREAS, the Congress has found that the Federal Government has a continuing but limited interest in the operation of the two federally owned airports serving the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government;

WHEREAS, the Congress has found that operation of the Metropolitan Washington Airports by an independent local agency will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978;

WHEREAS, the Congress has found that all other major air carrier airports in the United States are operated by public entities at the State, regional or local level;

WHEREAS, the Congress has found that any change in the status of the two airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the Federal Government and the State governments involved;

WHEREAS, the Congress has found that an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports; and

WHEREAS, the Congress has found that the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

NOW THEREFORE, under the authority of the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591, 100 Stat. 3341; Chapter 598, Virginia

Acts of Assembly, 1985, as it may be amended; and the District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67, as it may be amended; the parties do hereby agree as follows, for themselves and for their successors:

**Article 1. Definitions.**

The following terms when used in this lease shall have the meanings indicated below:

**1.A. Act**

The term "Act" means the Metropolitan Washington Airports Act of 1986, Title VI of Public Law 99-591, 100 Stat. 3341.

**1.B. Airports**

The term "Airports" means the Metropolitan Washington Airports.

**1.C. Airports Authority**

The term "Airports Authority" means the Metropolitan Washington Airports Authority, a public body created by the Commonwealth of Virginia and the District of Columbia.

**1.D. Airport Purposes**

The term "Airport Purposes" means a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for non-profit, public use facilities.

**1.E. Board of Directors**

The term "Board of Directors" means the Board of Directors of the Airports Authority.

**1.F. Board of Review**

The term "Board of Review" means the Board of Review of the Airports Authority established by the Board of Directors.

**1.G. Employees**

The term "Employees" means all permanent Federal Aviation Administration personnel employed on the date this lease takes effect by the Metropolitan Washington Airports, an organization within the Federal Aviation Administration, U.S. Department of Transportation.

**1.H. Leased Premises**

The term "Leased Premises" means the real property described in paragraph 3.A. hereof.

**1.I. Master Plan**

The term "Master Plan" means a generalized, comprehensive plan for the physical development of Washington National Airport or Washington Dulles International Airport as may be revised from time to time by the Airports Authority.

**1.J. Metropolitan Washington Airports**

The term "Metropolitan Washington Airports" means Washington National Airport and Washington Dulles International Airport.

**1.K. Secretary**

The term "Secretary" means the Secretary of Transportation of the United States, or her successor.

**1.L. Washington Dulles International Airport**

The term "Washington Dulles International Airport" means the airport constructed under the act entitled "An Act to authorize the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia", approved September 7, 1950 (64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between the Interstate Routes I-495 and I-66.

**1.M. Washington National Airport**

The term "Washington National Airport" means the airport described in the act entitled "An Act to provide

for the administration of the Washington National Airport, and for other purposes", approved June 29, 1940 (54 Stat. 686).

#### *Article 2. Purpose.*

The purpose of this lease is to transfer the operating responsibility for the Metropolitan Washington Airports to the Metropolitan Washington Airports Authority pursuant to the Act and to make the conditions imposed therein upon the authority of the Secretary to enter into a lease of the Metropolitan Washington Airports applicable to the Airports Authority.

#### *Article 3. Leased Premises.*

##### *3.A. Grant of Lease.*

The Secretary, on behalf of the United States of America, hereby demises and leases to the Airports Authority the two Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, being the parcels of land, together with all right, title and interest, if any, of the Secretary in and to any street or road abutting or included within the described land, and all rights of way, easements, licenses and permits relating thereto, and all improvements thereon, bounded and described in *Appendix A*.

##### *3.B. Scope.*

The Airports Authority is hereby authorized to occupy, operate, control and use, for the term of this lease all land, improvements, buildings, fixtures, easements, rights of ingress and egress and appurtenances thereto belonging, owned by, used or controlled by or assigned to the United States of America on or at the Leased Premises. Subject to the provisions of this lease, the Airports Authority shall have, consistent with the 50-year minimum term of this lease, full power and dominion over, and complete discretion in, operations and development of the

Airports, and shall have the same proprietary powers and be subject to the same restrictions with respect to federal law as any other airport, except as otherwise provided herein.

##### *3.C. Warranty of Title.*

The Secretary hereby warrants and covenants on behalf of the United States of America that the United States of America is the owner of good, fee simple and marketable title to all of the Leased Premises, free and clear of all liens, debts, encumbrances or restrictions of whatsoever kind, nature and description, other than leases and easements presently in effect that do not adversely affect the operation of the Airports, and the Secretary has full power and authority to convey the interests described in this lease in accordance with the provisions hereof.

##### *3.D. Quiet Enjoyment.*

The Secretary covenants on behalf of the United States of America that, during the period commencing on the effective date of this lease and ending on the expiration of the term of this lease in accordance with the terms hereof, the Airports Authority shall fully, peaceably and quietly occupy and enjoy the full possession of the Leased Premises without hindrance or interference by the Secretary or any other person or entity.

#### *Article 4. Transfer of Personal Property.*

The Secretary, on behalf of the United States of America, hereby grants, transfers and conveys to the Airports Authority, without condition (and not as a lease), all right, title and interest in and to all equipment, materials, furnishings and all other personal property appurtenant to or located on the Leased Premises, excluding personal property necessary for the Secretary's Air Traffic Control responsibilities, and including, but not limited to, the items specifically described in the inventory to be com-

pleted before the effective date of this lease and identified as "Inventory for Metropolitan Washington Airports." Such personal property is transferred in "as is" condition and the Secretary makes no warranties as to the suitability of any such property for any particular use.

\* \* \* \*

#### *Article 9. Effective Date.*

This lease shall be effective on the date on which the Secretary and the Airports Authority certify that the Governor of Virginia and the Mayor of the District of Columbia have approved the lease and that all conditions in Articles 15 and 20 have been satisfied.

#### *Article 10. Term and Extensions.*

##### *10.A. Term.*

The term of this lease shall be for fifty years commencing on the effective date as determined under Article 9.

##### *10.B. Lease Extensions.*

The Secretary and the Airports Authority may at any time negotiate an extension of this lease.

##### *10.C. Good Faith Negotiation.*

In the event that the Airports Authority reasonably shall determine that an extension of the term of this lease is required in order to entitle the Airports Authority to amortize the indebtedness that will result from the financing of any improvements at the Airports over a period equal to the estimated useful life of such improvements, the parties agree to negotiate in good faith a commensurate extension of such term.

##### *10.D. Expiration.*

Upon the expiration of this lease, the Airports Authority covenants and agrees that it will give up, surrender and deliver to the Secretary the Leased Premises to-

gether with all buildings, structures and improvements thereon (as the same may have been altered or replaced), as well as all personal property, furniture, fixtures and other equipment contained therein and used exclusively in connection with the operation of the Airports, the intent being that when the Leased Premises are returned to the Secretary, such Leased Premises shall be in good condition as operating airports, depreciation, obsolescence, and ordinary wear and tear excepted, all of which shall be free and clear of any and all liens, debts or encumbrances which would necessitate payment by the Secretary.

#### *Article 11. Continuing Obligations.*

##### *11.A. Airports Authority's Legal Status.*

The Airports Authority is a public body corporate and politic that meets the requirements of section 6007 of the Act. The Airports Authority agrees to refrain from action that would alter such status and to use its best efforts to maintain this status.

##### *11.B. Operation of Airports.*

The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

##### *11.C. Airport Improvement Program Requirements.*

The Airports Authority shall be subject to the requirements of section 511(a) of the Airport and Airway Improvement Act of 1982 (hereinafter the "1982 Act") and the assurances and conditions required of grant recipients under the 1982 Act as of the date the lease takes effect, to the same extent as would be an airport that received a grant under the 1982 Act on the effective date of this lease. As in the case of any other airport, any such assurance which, by its terms, is project specific shall apply only to projects on which Federal grant funds are

expended. Notwithstanding section 511(a)(12) of the 1982 Act, all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of the Airports.

**11.D. Contracts.**

In acquiring by contract supplies or services for an amount estimated to be in excess of \$200,000, or awarding concession contracts, the Airports Authority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Airports Authority may grant exceptions to the requirements of this paragraph.

**11.E. Continuation of Regulations.**

All regulations applicable to the Metropolitan Washington Airports and included in Part 159 of the Federal Aviation Regulations, 14 C.F.R. Part 159, on the effective date of this lease shall become regulations of the Airports Authority on that date and shall remain in effect until modified or revoked by the Airports Authority in accordance with procedures of the Airports Authority.

**11.F. Limitations on Aircraft Operations.**

(1) The Airports Authority shall not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 C.F.R. 93.121 et seq.) at Washington National Airport as in effect on October 18, 1986, and shall not, after the effective date of this lease, impose a limitation on the number of passengers taking off or landing at Washington National Airport.

(2) The Airports Authority agrees that any action changing or having the effect of changing the hours of operation of or the type of aircraft serving either of the Metropolitan Washington Airports may be taken only by

adoption of or amendment to regulations of the Airports Authority.

**11.G. Assumption of Rights, Liabilities and Obligations.**

(1) *In General.* Except as provided in subparagraph 2 of this paragraph, the Airports Authority hereby agrees that it shall assume all rights, liabilities, and obligations (tangible and incorporeal, present and executory) of the Secretary with respect to the Metropolitan Washington Airports organization of the Federal Aviation Administration on the effective date of this lease, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, accounts payable, and litigation relating to such rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. To the extent practicable, the Secretary shall provide at the effective date of this lease a summary list of the foregoing which involve material obligations.

(2) *Exceptions.* The procedure for disputes resolution contained in any contract entered into on behalf of the United States before the effective date of this lease shall continue to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the United States as the owner and operator of the Metropolitan Washington Airports, arising before the date the lease takes effect shall be adjudicated as if the lease had not been entered into.

(3) *Payments Into Employee Compensation Fund.* The Federal Aviation Administration, and not the Airports Authority, shall be responsible for reimbursing the Employees' Compensation Fund, pursuant to section 8147 of title 5, United States Code, for compensation paid or payable after the effective date of this lease in accordance with chapter 81 of title 5, United States Code, with regard to any injury, disability, or death due to events aris-

ing before such date, whether or not a claim has been filed or is final on such date.

*11.H. Use of Certain Revenues.*

No landing fee imposed for operating an aircraft or revenues derived from parking automobiles—

(1) at Washington Dulles International Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington National Airport; or

(2) at Washington National Airport may be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Washington Dulles International Airport.

*11.I. General Aviation Fees.*

The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Airports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee not in excess of the landing fee for aircraft weighing 12,500 pounds.

*11.J. Reporting Requirement.*

The Airports Authority agrees to provide annually to the Secretary a written report of any demolition during the previous year of structures conveyed under this lease.

*Article 12. Capital Improvements.*

*12.A. Master Plans.*

The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports, including the adoption of the Dulles Master Plan and the Completion of a Master Plan for Washington National Airport, and may revise such Master Plans from time to time or

adopt subsequent Master Plans for the development of the Airports. Major improvements to the Airports shall be consistent with the most recently adopted Master Plans.

*12.B. Improvement Schedule.*

The Airports Authority acknowledges its intent, to the extent practicable, to:

(1) pursue the improvement, construction and rehabilitation of the facilities at Washington Dulles International Airport and Washington National Airport simultaneously; and

(2) cause the improvement, construction, and rehabilitation proposed by the Secretary to be completed at both of such Airports within five years of the earliest date on which the Airports Authority issues bonds or other long-term evidences of indebtedness.

*Article 13. Board of Review.*

*13.A. Establishment and Composition.*

Before taking any actions listed in paragraph 13.D. of this Article, the Board of Directors shall establish a nine-member Board of Review of the Airports Authority and appoint to it representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities. The Board of Directors shall appoint:

(1) two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the U.S. House of Representatives from a list or lists of recommended appointees provided by the Speaker of the House;

(2) two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the U.S. Senate from a list or lists of recommended appointees provided by the President pro tempore of the U.S. Senate; and

(3) one member chosen alternatively from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.

The members of the Board of Review shall elect a chairman. The Board of Directors may not appoint a member of the House of Representatives or the Senate from Maryland or Virginia, or the Delegate from the District of Columbia, to the Board of Review.

#### *13.B. Terms.*

Members of the Board of Review appointed under subparagraphs (1) and (2) of paragraph 13.A. above shall be appointed for six years, except that of the members first appointed, one member under each of subparagraphs (1) and (2) shall be appointed for a term of two years and one member under each of subparagraphs (1) and (2) shall be appointed for a term of four years. Members of the Board of Review appointed under subparagraph (3) of paragraph 13.A. shall be appointed for terms of two years. A vacancy in the Board of Review shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term.

#### *13.C. Procedures.*

The Board of Review shall establish procedures for conducting its business. The procedures may include requirements for a quorum at meetings and for proxy voting. The Board of Review shall meet at least once each year and shall meet at the call of the chairman or three members of the Board. Any decision of the Board of Review under paragraph 13.D. or 13.F. shall be by a vote of five members.

#### *13.D. Disapproval Procedure.*

The Board of Directors shall submit the following actions to the Board of Review at least thirty days (or at least sixty days in the case of the annual budget) before they are to become effective:

- (1) the adoption of an annual budget;
- (2) the authorization for the issuance of bonds;
- (3) the adoption, amendment, or repeal of a regulation;
- (4) the adoption or revision of a Master Plan, including any proposal for land acquisition; and
- (5) the appointment of the chief executive officer.

If the Board of Review does not disapprove an action within thirty days of its submission under this Article, the action may take effect. If the Board of Review disapproves any such action, it shall notify the Board of Directors and shall give reasons for the disapproval, and that action shall not take effect. Unless an annual budget for a fiscal year has taken effect in accordance with paragraph 13.D., the Airports Authority shall not obligate or expend any money in such fiscal year, except for (1) debt service on previously authorized obligations, and (2) obligations and expenditures for previously authorized capital expenditures and routine operating expenses.

#### *13.E. Request for Consideration of Other Matters.*

The Board of Review may request the Board of Directors to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Board of Directors shall consider and vote, or report, on the matter as promptly as feasible.

**13.F. *Participation in Meetings of the Airports Authority.***

Members of the Board of Review shall be permitted to participate as nonvoting members in meetings of the Board of Directors.

**13.G. *Staff.***

The Board of Review may hire two staff persons to be paid by the Airports Authority. The Airports Authority shall provide such clerical and support staff as the Board of Review may require. All such staff shall be employees of the Airports Authority.

**13.H. *Effect of Litigation.***

The Airports Authority agrees that if the Board of Review is unable to carry out its functions described in this Article by reason of a judicial order, the Airports Authority will not take any action that must be submitted to the Board of Review under paragraph 13.D. above.

\* \* \* \*

**Article 16. *Payments.***

**16.A. *Lease Payments.***

The Airports Authority shall pay an annual rental to the account of the United States Treasury. For the first year of this lease, such annual rental shall be \$3,000,000. Subsequent annual rental payments shall be adjusted as of each anniversary of the effective date of this lease so as to equal \$3,000,000.00 in 1987 dollars by applying the Implicit Price Deflator for the Gross National Product published by the Department of Commerce in the March edition of the Survey of Current Business, or the appropriate successor index, as determined by the Secretary of Commerce. The parties may renegotiate the level of lease payments attributable to inflation costs every ten years. Lease payments shall be made from any

moneys of the Authority legally available for such purpose, after the Authority shall have first (i) satisfied its contractual obligations in respect of debt service on its bonds and other indebtedness and (ii) paid or set aside the amounts required for payment of the operating and maintenance expenses of the Airports. Subject to the foregoing, the Airports Authority shall make lease payments in semiannual installments commencing six months after the effective date of this lease. At the end of each month, the Airports Authority shall direct available funds into a reserve of the Airports Authority for purposes of making such lease payments, intended to accumulate on as equal a basis as possible the amounts due on the next lease payment date, which reserve shall be deposited in interest-bearing accounts or investment selected by the Airports Authority, with the rent payment and the interest actually accrued on the reserve account to be payable to the Treasury on the next lease payment date.

**16.B. *Retirement Obligations.***

(1) Not later than one year after the effective date of this lease, the Airports Authority shall pay to the account of the United States Treasury an amount determined by the Office of Personnel Management to represent the actual added costs incurred by the Civil Service Retirement and Disability Fund due to discontinued service retirement under section 8336(d)(1) of Title 5, United States Code, of Employees who elect not to transfer to the Airports Authority.

(2) Not later than one year after the effective date of this lease, the Airports Authority shall pay to the Treasury of the United States an amount determined by the Office of Personnel Management to represent the present value of the difference between (a) the future cost of benefits payable from the Civil Service Retirement and Disability Fund and due the Employees covered under section 6008(e) of the Act that are attributable to the

period of employment following the effective date of this lease, and (b) the contributions made by the Employees and the Airports Authority under section 6008(e) of the Act. In determining the amount due, the Office of Personnel Management shall take into consideration the actual interest such amount can be expected to earn when invested in the Treasury of the United States.

#### *16.C. Delinquent Payments.*

In the event payments under this lease are delinquent so as to constitute an Event of Default under subparagraph B.(1) of Article 23, the Secretary may, in addition to other rights available under this lease, assess interest at the Treasury Current Value of Funds Rate as prescribed by the Secretary of the Treasury on the date payment was due. In addition to this interest, penalty charges not to exceed six percent per year shall be assessed on any portion of a payment which is over 90 days past delinquent. Penalty charges shall accrue from the date the payment became delinquent and shall continue to accrue until payment is received. Delinquent payments may be collected by administrative offset whenever possible.

\* \* \* \*

#### *Article 19. Hold Harmless.*

To the extent permitted by applicable law, the Airports Authority shall indemnify, defend, and hold harmless the Secretary, her agents and employees, from any and all claims, liability, damage and expense incurred by reason of death, injury, loss or damage of or to persons or property arising out of the Airport Authority's operation, use and occupancy of the Metropolitan Washington Airports after the effective date of this lease. As between the parties hereto, the Airports Authority assumes all risk and liability for itself, its agents, employees, or contractors for any injury to persons or property resulting in any manner from the conduct of its opera-

tions, and the operations of its agents, or employees, and for any loss, cost, damage or expense resulting at any time from any cause due to any act or acts, negligence, or the failure to exercise proper precautions, of or by itself or its agents, or its employees, while occupying or operating the Metropolitan Washington Airports. Nothing herein shall be construed to indemnify the Secretary, her agents and employees for claims, liability, damage and expense arising in whole or in part from their own negligent or intentional acts or omissions.

\* \* \* \*

#### *Article 22. No Assignment.*

The Airports Authority shall not, through assignment of this lease or otherwise, substitute any other person for the Airports Authority as the party obligated as the tenant under this lease. Notwithstanding the foregoing, the Airports Authority shall be entitled from time to time and in its discretion to create easements, grant licenses, and sublease portions of the Leased Premises for use by subtenants, for purposes consistent with, and subject to the provisions of, this lease. No such sublease shall relieve the Airports Authority from any of its obligations pursuant to this lease.

#### *Article 23. Defaults, Events of Defaults and Remedies.*

##### *23.A. Defaults.*

Each of the following shall constitute a default by the Airports Authority:

- (1) failure by the Airports Authority to pay when due any lease payment required to be made by Article 16 hereof;
- (2) use of the Leased Premises for other than Airport Purposes; and
- (3) breach by the Airports Authority of any provision, other than those covered above, of this lease.

*23.B. Events of Default.*

Each of the following shall constitute an Event of Default:

- (1) the continuation of a default described in subparagraph A.(1) of this Article for 30 days after the due date of such payment;
- (2) the continuation of a default described in subparagraph A.(2) of this Article for 30 days after the receipt by the Airports Authority of a written notice from the Secretary specifying the claimed default, the affected portion of the Leased Premises, and the nature of the uses asserted not to be for Airport Purposes, provided that no Event of Default shall occur if the Airports Authority shall in good faith have commenced, within such 30 day period, to remedy such default and shall diligently and continuously proceed to cure such default; or
- (3) the continuation of a default described in subparagraph A.(3) of this Article for 30 days after the receipt by the Airports Authority of a written notice from the Secretary specifying the claimed default, provided that no Event of Default shall occur if the Airports Authority shall in good faith have commenced, within such 30 day period, to remedy such default and shall diligently and continuously proceed to cure such default.

*23.C. Remedies.*

Upon the occurrence and during the continuation of any Event of Default

- (1) described in subparagraph B.(1) or B.(3), of this Article, the Secretary may request the Attorney General to bring an appropriate action to compel the Airports Authority and its officers and employees to comply with the terms of this lease, and

(2) described in subparagraph B.(2) of this Article, the Secretary shall (a) direct that appropriate measures be taken by the Airports Authority to bring the use of such portion of the Leased Premises in conformity with Airport Purposes, and (b) retake possession of such portion of Leased Premises if the Airports Authority fails to bring the use of such portion into a conforming use within a reasonable period of time, as determined by the Secretary.

*23.D. Rights and Remedies.*

The rights and remedies of the Secretary in this Article are exclusive of any other rights and remedies.

**Article 24. Disputes.**

**24.A. Litigation Procedure.**

Under section 6005(e) of the Act, the district courts of the United States shall have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of this lease. An action may be brought on behalf of the United States by the Attorney General, or by any aggrieved party. An action to enforce the terms and conditions of this lease may also be brought on behalf of the Airports Authority in a district court of the United States.

Except as a court may order or the parties to this lease may otherwise agree in writing, pending resolution of any action under this Article, the parties shall proceed diligently with performance of all obligations under this lease.

**24.B. Litigation Records.**

Records relating to matters litigated under this Article or to litigation or the settlement of claims arising under or relating to this lease shall be retained until such litigation (including any appeals) or claims are disposed of.

\* \* \* \*

*Article 27. Lease Not Affected by Oral Agreement.*

No oral statement of any person shall modify or otherwise affect the terms, conditions, or limitations stated in this lease. All modifications to this lease must be made in writing by the Secretary and the Airports Authority or their authorized representatives.

*Article 28. Law of Agreement.*

This lease shall be governed by and construed in accordance with federal law. To the extent that the application of federal law requires or permits the application or consideration of state law, the parties agree that the law of the Commonwealth of Virginia is most relevant to this lease and shall be applied or considered. The powers of the Secretary with respect to this lease shall be construed in accordance with and governed by Federal law, and the powers of the Airports Authority with respect to this lease shall be construed in accordance with and governed by Virginia law.

*Article 29. No Waiver.*

No failure by either party to insist upon the strict performance of any agreement, term, covenant or condition hereof or to exercise any right or remedy consequent upon a breach thereof, and no payment or acceptance of full or partial payments during the continuance of any such breach, shall constitute a waiver of any such breach or of such agreement, term, covenant or condition. No waiver of any breach shall affect or alter this lease, but each and every agreement, term, covenant and condition hereof shall continue in full force and effect with respect to any other then-existing or subsequent breach thereof.

*Article 30. Captions.*

The captions and headings in this lease are inserted only as a matter of convenience and for reference, and

they in no way define, limit or describe the scope of this lease or the intent of any provision thereof.

*Article 31. Partial Invalidity.*

If any term or provision of this lease, or the application thereof to any person or circumstance, shall to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this lease, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of the lease shall be valid and be enforced to the fullest extent permitted by law.

*Article 32. Certificate of the Secretary.*

The Secretary agrees to execute and deliver to the Airports Authority and/or any other person or entity designated by the Airports Authority, at any time and from time to time, upon not less than 30 days' prior written notice by the Airports Authority (which notice shall state that the Airports Authority requires same in connection with a financing or other undertaking), a statement in writing:

- (i) certifying that this lease is unmodified and in full force and effect (or if there have been modifications, that the lease is in full force and effect as modified and stating the modifications);
- (ii) stating the dates to which lease payments and other charges hereunder have been paid by the Airports Authority;
- (iii) stating whether, to the best knowledge of the Secretary, the Airports Authority is in default in the performance of any covenant, agreement or condition contained in this lease, and if so, specifying the nature of such default; and

(iv) stating the address to which notices to the Secretary are to be sent.

Any such statement delivered by the Secretary may be relied upon by any lender, bond holder, trustee or other person proposing to enter into agreements with the Airports Authority as an estoppel of the Secretary's right to assert a position inconsistent with such position.

\* \* \* \*

*Article 35. Memorandum of Lease.*

Upon the request of the Airports Authority, the Secretary agrees to execute, in recordable form, a short-form memorandum of this lease, which memorandum may be recorded at the Airports Authority's expense in appropriate land records.

ENTERED INTO THIS SECOND DAY OF MARCH, 1987

For the United States of America:

/s/ Elizabeth Hanford Dole  
**ELIZABETH HANFORD DOLE**  
Secretary of Transportation

For the Metropolitan Washington Airports Authority:

/s/ Linwood Holton  
**A. LINWOOD HOLTON, JR.**  
Chairman, Board of Directors

[Notary Stamp Omitted in Printing]

APPROVED, pursuant to section 3 of Chapter 598, Virginia Acts of Assembly, 1985 Session:

/s/ Gerald L. Baliles  
**GERALD L. BALILES**  
Governor of Virginia

APPROVED, pursuant to section 4 of D.C. Law 6-67:

/s/ Marion Barry, Jr.  
**MARION BARRY, JR.**  
Mayor of the District of Columbia

**Metropolitan Washington Airports Lease  
Certification of Effective Date**

In accordance with Article 9 of the Lease of the Metropolitan Washington Airports between the United States of America and the Metropolitan Washington Airports Authority as entered into on March 2, 1987 (the Lease), we hereby certify that: 1) the Governor of Virginia and the Mayor of the District of Columbia have approved the Lease; 2) all conditions in Articles 15 and 20 of the Lease have been satisfied; and 3) the Lease shall be effective as of 12:01 a.m., June 7, 1987.

Executed this 5 day of June, 1987.

/s/ Linwood Holton  
**LINWOOD HOLTON**  
Chairman, Board of Directors  
Metropolitan Washington Airports Authority

**Metropolitan Washington Airports Lease  
Certification of Effective Date**

In accordance with Article 9 of the Lease of the Metropolitan Washington Airports between the United States of America and the Metropolitan Washington Airports Authority as entered into on March 2, 1987 (the Lease), I hereby certify that: 1) the Governor of Virginia and the Mayor of the District of Columbia have approved the Lease; 2) all conditions in Articles 15 and 20 of the Lease have been satisfied; and 3) the Lease shall be effective as of 12:01 a.m., June 7, 1987.

Executed this 5 day of June, 1987

/s/ Elizabeth Hanford Dole  
**ELIZABETH HANFORD DOLE**  
Secretary of Transportation

DEC 19 1990

JOSEPH P. SPANOL, JR.  
CLERK

(3)  
No. 90-906

IN THE  
**Supreme Court of the United States**  
**OCTOBER TERM, 1990**

METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, *et al.*,

*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia Circuit

**BRIEF IN RESPONSE TO PETITION  
FOR A WRIT OF CERTIORARI**

PATTI A. GOLDMAN  
*Counsel of Record*  
ALAN B. MORRISON

Public Citizen Litigation Group  
Suite 700, 2000 P Street, N.W.  
Washington, D.C. 20036  
(202) 785-3704

*Attorneys for Respondents*

## **QUESTIONS PRESENTED**

1. May a federal statute require that a regional airports authority agree, as a condition of obtaining a lease of federal airports, to give Members of Congress a veto over the operation of those airports, when Congress could not exercise that power directly consistent with the doctrine of separation of powers, the Bicameralism and Presentment Clauses, the Appointments Clause, and the Incompatibility Clause of the Constitution?
2. Did the courts below err in holding that this case satisfies the ripeness and standing requirements of Article III of the Constitution?

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**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1990**

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No. 90-906

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METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, *et al.*,

*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia Circuit

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**BRIEF IN RESPONSE TO PETITION  
FOR A WRIT OF CERTIORARI**

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Respondents, Citizens for the Abatement of Aircraft Noise, John W. Hechinger, Sr., and Craig H. Baab, do not oppose granting the petition for a writ of certiorari because they recognize the significance of the ruling of the Court of Appeals which held key provisions of a federal statute unconstitutional. Moreover, the case has significance beyond this statute because the scheme under review provides a blueprint that Congress could use to give itself a legislative veto over other exercises of delegated power under the Property and Spending Clauses, in circumvention of this Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919

(1983). Thus, although the Court of Appeals correctly found this legislative veto unconstitutional, respondents agree that an issue of this magnitude warrants this Court's review.

## STATEMENT

In their petition, the Metropolitan Washington Airports Authority ("Airports Authority") and its Board of Review, accurately describe the Airports Authority's Board of Directors and the general nature of the transfer. However, because their description of the purposes and powers of the Board of Review is incomplete, respondents have included an overview of the Board of Review's authority and its legislative history, as well as a description of a key statutory provision — never mentioned in the petition — that deprives the Airports Authority of its core powers if the Board of Review is invalidated. Respondents also provide a more complete description of the uncontested facts that give them standing to challenge the Board of Review provisions and that make their challenge ripe for review.

### A. The Board of Review

In order to obtain support for its plan to divest the federal government of managerial responsibilities over Washington National and Washington Dulles International Airports, the Secretary of Transportation appointed an advisory commission to develop proposals for transferring the airports to a state, local, or regional body. Joint Appendix in the Court of Appeals ("J.A.") at 50. After the advisory commission recommended that the two Washington-area airports be leased to a regional authority, J.A. 50-55, the Commonwealth of Virginia and the District of Columbia enacted laws authorizing the establishment of a regional authority in keeping with the advisory commission's recommendations. 1985 Va. Acts ch. 598;

D.C. Law 6-67 (1985). Like those recommendations, neither the Virginia nor the District of Columbia laws required, or even permitted, the establishment of a Board of Review that would oversee the Airports Authority's actions.

During the same time frame, the United States Senate passed a bill, at the behest of the administration, that also would have led to a complete transfer of financial and operational control over the Washington-area airports, as recommended by the advisory commission. Senate Comm. on Commerce, Science, & Transportation, *Metropolitan Washington Airports Transfer Act of 1985*, S. Rep. No. 193, 99th Cong., 1st Sess. 3 (1985) ("Senate Report"); 132 Cong. Rec. S4116 (daily ed. April 11, 1986). Although the primary opposition to the bill came from Senators who wanted to retain federal control over the airports, the Senate bill did not contain any type of Board of Review or any other mechanism for Congress to retain control over the airports after their transfer. Senate Report at 19-21; *Transfer of National & Dulles Airports: Hearings Before the Subcomm. on Aviation, Senate Comm. on Commerce, Science, & Transportation*, S. Hrg. 338, 99th Cong., 1st Sess. 2-3 (June 26 & July 11, 1985); 132 Cong. Rec. S4116-20 (daily ed. Apr. 11, 1986).

In the House of Representatives, many Members vigorously opposed the transfer because they wanted to retain federal control over the airports. Thus, one Representative stated: "Local residents opposed to nearby noise have, for many years, attempted to close National Airport and divert the traffic to Dulles... . If we transfer this airport to local control, what assurance do we have that local residents will now, all of a sudden, start supporting these improvements at National?" *Proposed Transfer of Metropolitan Washington Airports: Hearings Before Subcomm. on Aviation, House Comm. on Public Works & Transportation*, H.R. Hrg. No. 61, 99th Cong., 2d Sess. 22 (June 24 & 26, 1986) (statement of Rep. Sundquist).

In an attempt to retain federal control over the airports, the House Subcommittee on Aviation drafted several substitute bills that would have established a congressional Board of Review with the power to veto major actions taken by the Airports Authority, such as adoption of an annual budget, issuance of bonds, promulgation of regulations, and approval of development plans. J.A. 63-66, 86-88, 115-18, 133-36. While the drafts differed in the way the Board of Review members would be selected, they all required that the Board be composed of Members of Congress, with two drafts adding the Comptroller General, a congressional official, and another draft adding the chief executive officers of Virginia, Maryland, and the District of Columbia. *Id.*

In order to bolster congressional support for the administration's transfer legislation, Assistant Attorney General John R. Bolton rendered an advisory opinion on the constitutionality of the proposed Board of Review provisions. J.A. 61-69. In that opinion, Mr. Bolton concluded that a veto by a congressional Board whose members were appointed by the congressional leadership, as in all but one of the draft bills, "would plainly be legislative action that must conform to the requirements of Article I, section 7 of the Constitution: passage by both Houses and approval by the President," citing *Chadha*, 462 U.S. at 954-55. J.A. 61-63, 66-67. Moreover, according to Mr. Bolton, "since the responsibilities to be exercised by the Board are clearly operational, participation by members of Congress chosen by the leadership would violate the Incompatibility Clause and the Appointments Clause of the Constitution . . . and members of Congress could serve, if at all, only in an advisory capacity." J.A. 62-63 (quotations of constitutional provisions omitted). However, the Justice Department concluded that, "[a]lthough the issue is not free from doubt," J.A. 68, a third plan would overcome the *Chadha* bar because it would allow the congressional leadership to

nominate Members of Congress to serve on the Board of Review, but the Airports Authority would actually appoint the Members of Congress to serve in their individual capacities as representatives of airport users rather than as representatives of Congress. J.A. 67-68.

Armed with the Department of Justice's stamp of approval, the Senate added this last version of the congressional Board of Review to the transfer legislation, and then passed the amended bill, without any hearings or debate on the review board. 132 Cong. Rec. S14,862-65 (daily ed. Oct. 3, 1986). In the House floor debate, which constitutes the only recorded discussion of the Board of Review provisions, numerous Members of Congress stressed the importance of this feature of the Act. As one Member put it, the bill "provides for continued congressional control over both airports [since] Congress would retain oversight through a Board of Review made up of nine Members of Congress [who] would have the right to overturn major decisions of the airport authority . . ." 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986) (statement of Rep. Coughlin). Another Member reiterated that the "board has been established to make sure that the Nation's interest, the congressional interest[,] was attended to in the consideration of how these two airports are operated." *Id.* at H11,103 (statement of Rep. Hoyer). These sentiments were echoed by several other Representatives, including one who stated:

Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority . . . We are getting our cake and eating it too. . . . The beauty of the deal is that Congress retains its control without spending a dime.

*Id.* at H11,100 (statement of Rep. Smith); accord *id.* at

H11,098 (statement of Rep. Lehman); *id.* at H11,104 (statement of Rep. Smith); *id.* (statement of Rep. Dickinson); *id.* at H11,105 (statement of Rep. Conte); *id.* at H11,106 (statement of Rep. Hammerschmidt).

As enacted into law, the Metropolitan Washington Airports Act of 1986 ("Transfer Act") requires that the Board of Directors of the Airports Authority establish, as a condition of the transfer of the airports, a nine-member Board of Review composed exclusively of Members of Congress. 49 U.S.C. App. § 2456(f)(1). The Transfer Act specifies that, aside from one Member of Congress chosen alternately from the House and the Senate, the Board must consist of two Members from each of the four congressional committees with principal jurisdiction over the Washington-area airports — the House Public Works and Transportation Committee, the House Appropriations Committee, the Senate Commerce, Science, and Transportation Committee, and the Senate Appropriations Committee. *Id.* While the Transfer Act states that these Members of Congress will serve "in their individual capacities, as representatives of the users of the Metropolitan Washington Airports," *id.*, they must all be Members of Congress and they cannot be Representatives or Senators from Maryland or Virginia or the District of Columbia Delegate. *Id.* Moreover, the Airports Authority is not free to select anyone even from the eligible Members of Congress, but is limited to the names submitted by the Speaker of the House and the President *pro tempore* of the Senate, who are not required to, and, in practice, have sometimes failed to, submit more names than the number of vacant slots. *Id.*; J.A. 143-44, 148-49.<sup>1</sup>

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<sup>1</sup>While the Transfer Act is silent with respect to the power to remove Board of Review members, the Airports Authority has claimed the power to remove members for cause. J.A. 151-52. However, any replacement appointments must be nominated by the congressional leadership and must serve on the same congressional committees as the removed members.

The Board of Review has the power to veto the Airports Authority's core actions. 49 U.S.C. App. § 2456(f)(4). Thus, the Airports Authority cannot authorize the issuance of bonds, appoint a chief executive officer, adopt an annual budget, approve development or land acquisition plans, or change its regulations without first submitting its proposed action to the Board of Review for consideration and an opportunity to veto the action. *Id.*

Although the Transfer Act contains a general severability clause, § 2460, Congress added a special clause further assuring congressional control over the airports. That clause provides that, if the Board of Review "is unable to carry out its functions under this subchapter by reason of a judicial order, the Airports Authority shall have no authority to perform any of the actions that are required . . . to be submitted to the Board of Review." § 2456(h). This provision underscores Congress's intent to retain control over the airports either through the Board of Review or by rendering the Airports Authority essentially powerless to perform its tasks without further congressional action.

After the enactment of the Transfer Act, the Secretary of Transportation and the Airports Authority entered into a lease, which requires the Airports Authority to establish, and to be bound by the veto decisions of, a Board of Review that meets the Transfer Act's specifications. App. E at 175a-78a. The Airports Authority then adopted bylaws incorporating the Board of Review provisions contained in both the Transfer Act and the lease. App. E at 151a-54a.

It was not until after the Transfer Act had been enacted and the lease had been signed that Virginia and the District of Columbia amended their previously enacted airports authority laws to add any reference to a Board of Review. In compliance with the conditions of the federal Transfer Act and the federal lease,

these amendments give the Airports Authority the power "to establish a board of review," although they do not require it to do so. More importantly, these laws do not describe the composition of the Board, let alone mandate that its members all be Members of Congress. 1987 Va. Acts ch. 665, § 5.A.5; D.C. Law 7-18, § 3(c)(2) (1987).

As this discussion demonstrates, the Transfer Act does not merely "describe[ ]" the Board of Review's composition and authority or "suggest[ ]," "encourage," or "request[ ]" the Airports Authority to create such an entity, as stated in the petition at 14. Rather, the Act prescribes the precise composition and powers that the Board of Review must have, and it, along with the federal lease, mandate that the Airports Authority create, and be subservient to, such a Board of Review in order to receive, and have any power to operate, National and Dulles Airports.

### B. Respondents' Interests and Injuries

Respondent Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN"), is a nonprofit membership organization of individuals and citizens' groups who wish to minimize the noise, safety, and environmental effects of air traffic at National Airport. J.A. 157, 160-63. Most of its members, as well as the two individual respondents, live under National Airport's flight path, and their lives are regularly disrupted by aircraft noise, vibrations, traffic congestion, and pollution from air traffic at National Airport. J.A. 158; 164-65; 167-68.

In March of 1988, over CAAN's opposition, J.A. 177-80, the Airports Authority approved a master plan for National Airport, which provides for expanding the airport's capacity to handle night-time flights, additional day-time air carrier operations, and increased numbers of passengers and automobiles. J.A. 158, 170-71, 297, 314, 317-22, 328, 389-90.

Although the Board of Review had previously exercised its veto to prevent the use of the Dulles Access Road for car pool commuter traffic, J.A. 153-54, the Board voted not to veto the master plan. J.A. 297. The Airports Authority has since begun to implement the master plan by issuing several bond series to finance the expansion and by entering into construction contracts, which are underway. J.A. 20-21, 158-59.

As a practical matter, the Airports Authority can implement its master plan only if it has the power to raise and spend substantial funds for this purpose. However, if respondents are successful in this lawsuit, the Board of Review will be unable to exercise its veto power, and, because of the special severability clause, § 2456(h), the Airports Authority will lose its authority to issue bonds, to adopt an annual budget, and to adopt or revise a master plan, all of which are necessary for expansion of National Airport.

On cross-motions for summary judgment, the District Court rejected petitioners' justiciability claims. App. C at 29a. With respect to ripeness, it ruled that "this case is as ripe as it ever will be," since "the particular manner in which the veto power is exercised will [not] affect the constitutionality *vel non* of the body that exercises it." App. C at 38a. Moreover, the Court stressed, "[t]his is also not a situation where the possibility of a veto is abstract or ephemeral, for the Board of Review has already acted to disapprove one resolution passed by the Board of Directors." *Id.*

The District Court also held that respondents had standing to bring this challenge because they asserted, without challenge, that "they are harmed by noise, air pollution and the safety problems associated with flights to and from National." *Id.* at 41a. The Court found that these injuries are fairly traceable to the master plan, since "an increase in both passengers and flights could *not* occur without the significant

improvements contemplated by the Plan.” *Id.* (emphasis in original). Moreover, the relief sought would redress respondents’ injuries since “if the Authority may not issue bonds or adopt a budget, continued construction at National would cease, the additional capacity otherwise possible would be halted, and plaintiffs’ asserted injuries would be averted.” *Id.* at 41a-42a. Relying on *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), which concluded that “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights,” the District Court found that respondents also had standing because the Board of Review, which excludes local representation, diminishes their influence over airports matters *Id.* at 42a.

On appeal, the United States, which intervened pursuant to 28 U.S.C. § 2403(a), agreed with respondents and the District Court that this case is justiciable, although it supported petitioners on the merits. The Airports Authority urged the Court of Appeals to decide the merits, Appellees’ Brief at 12 n.8, although it reiterated some of its justiciability arguments in a cursory fashion in a footnote. *Id.* at 15-16 n. 9. In order to satisfy itself that it had jurisdiction over this case, the Court of Appeals briefly reviewed and summarily rejected the justiciability contentions that had been made in the District Court. App. A at 9a.

#### **REASONS FOR GRANTING THE WRIT AND AFFIRMING THE JUDGMENT BELOW**

Although the Court of Appeals correctly decided that the Board of Review provisions are unconstitutional, the first question presented warrants review by this Court because it raises significant separation of powers issues. In contrast, the second question raises no significant legal issues, but merely in-

volves the straightforward application of existing precedent to the uncontested facts of this case. Although the rejection of the justiciability arguments by all four judges who have heard this case is unassailable, respondents recognize that, to the extent that the justiciability claims are based on Article III, the Court must satisfy itself that a case or controversy is presented.

A. This case presents a significant constitutional issue, not because the Court of Appeals “federalized” separation of powers principles, as the petition asserts at 10-14, but rather because it invalidated an attempt by Congress to recapture the legislative veto and to assign executive functions to itself. Indeed, the Transfer Act’s Board of Review provisions provide a roadmap that would, if upheld, enable Congress to evade constitutional limitations on the way in which it may exercise its authority whenever federal property or money is the subject of legislation.

Since the Board of Review provisions authorize Members of Congress to participate in the execution of federal power by means other than passing laws, the most pertinent authorities are this Court’s decisions in *Chadha, supra*; *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928); and *Bowsher v. Synar*, 478 U.S. 714 (1986). Nonetheless, the petition makes absolutely no mention of *Chadha* and *Springer*, and ignores those aspects of *Bowsher* that impose limitations on Congress’s ability to carry out executive functions.

In *Chadha*, this Court held that a one-House legislative veto violated the Bicameralism and Presentment Clauses and that Congress must comply with these requirements whenever it takes actions that are legislative in character and effect, i.e., “that have the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative

Branch.” 462 U.S. at 952. Moreover, once Congress delegates a legislative power to the Executive Branch, it “must abide by its delegation of authority until that delegation is legislatively altered or revoked.” *Id.* at 955.

The corollary principle, established in *Springer* and applied in *Bowsher*, is that the legislature “cannot engraft executive duties upon a legislative office.” 277 U.S. at 202. In *Springer*, which in many respects is the most analogous case to this one, this Court held that members of a territorial legislature could not serve on committees that had the authority to vote the government-owned stock of a government corporation and to appoint the executive officials who ran the corporation. Because these functions are not in aid of any legislative functions, but instead are executive in nature, the Court held that legislative officials could not constitutionally perform them. *Id.* Similarly, in *Bowsher*, this Court barred a congressional official from carrying out executive functions.

Under these decisions, the Constitution imposes affirmative limitations on the method by which Congress can affect legal rights. Congress may pass a law pursuant to the constitutional lawmaking process, but it may not retain veto powers over functions that it has delegated to another entity. As the Court stated in *Bowsher*, “once Congress makes its choices in enacting legislation, its participation ends.” 478 U.S. at 733. Indeed, in *Mistretta v. United States*, 488 U.S. 361 (1989), and *Morrison v. Olson*, 487 U.S. 654 (1988), on which petitioners principally rely, Congress abided by these limitations and simply passed laws without making any effort to control their implementation.

There has never been any dispute over whether Congress could have given itself or any group of its Members a veto power over airports decisions as long as the Federal Aviation Administration operated the airports; *Chadha*, *Springer*, and

*Bowsher* clearly would have prohibited such direct congressional intrusion into executive powers. There is also general agreement that Congress could not, under this line of cases, directly create a congressional body that has the power to veto major actions of the Airports Authority. The only issue is whether these constitutional prohibitions apply when, instead of directly establishing the congressional veto power, Congress required the Airports Authority to establish the Board of Review and to be bound by its veto decisions as a condition of leasing the federal airports and of exercising the other powers set forth in the Transfer Act.

The petition asserts that federal separation of powers principles do not constrain the Board of Review because (1) it is a state-created entity, and (2) Congress may give itself the power to perform executive functions when it does so as a condition to the grant of federal property or money to a state or local entity. These contentions are plainly inconsistent with the rationale and results of prior separation of powers rulings of this Court.

The Court of Appeals correctly concluded that “it is wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny.” App. A at 12a. Indeed, as the Court recognized, “the ‘practical consequences’ of the current arrangement are to maintain in place by federal law a body composed exclusively of members of Congress that exercises operational control over the airports.” *Id.*

After all, it is the Transfer Act that mandates the creation of the Board of Review and that prescribes its congressional membership and its veto authority, and it is the federal lease that requires the Airports Authority to make itself subservient to the Board of Review as a condition of receiving the Washington area airports. The Airports Authority bylaws

merely parrot the federal statute and lease, and the Virginia and District of Columbia laws do no more than authorize the creation of a board of review, without requiring the Airports Authority to do so, and without specifying its congressional membership or prescribing its veto authority. In all these respects, the Board of Review is a creation of federal, not state law.

The terms of the Transfer Act make it clear that the purpose of imposing the Board of Review on the Airports Authority was to retain congressional control over the airports after their transfer. That is why the Board must be composed of nine Members of Congress, eight of whom must serve on the committees with oversight over the airports, and all of whom must be nominated by the congressional leadership. That is also why the Board has the power to veto the core powers that the Airports Authority must have to operate the airports effectively. Most importantly, that is why Congress added the special severability clause that guts the Airports Authority's powers if the Board of Review is precluded from exercising its veto.

If there were any doubt that the Board of Review is a congressionally mandated device for retaining congressional control over the airports, the floor debate on that provision points unequivocally to Congress's true intent — to make sure that “the congressional interest [is] attended to in the consideration of how these two airports are operated.” 132 Cong. Rec. at H11,103 (statement of Rep. Hoyer). It can be stated no more succinctly than the words of Representative Smith: “We are getting our cake and eating it too... . The beauty of the deal is that Congress retains its control without spending a dime.” *Id.* at H1,100.

For all of these reasons, the Court of Appeals correctly held that the power of the Board of Review over the Airports

Authority is a retained federal power that must be exercised in accordance with the principle of separation of powers. Accordingly, Congress and its Members are barred from exercising that power without going through the constitutional lawmaking process, which the Board of Review admittedly does not follow.

Although the Court of Appeals held that the Board of Review violates the doctrine of separation of powers, there are alternative grounds for affirming the ruling below. Thus, the Members of Congress charged with carrying out this retained federal power are “exercising significant authority pursuant to the laws of the United States,” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), as the Court of Appeals observed. App. A at 10a, 15a-16a. As such, they must be appointed in accordance with the Appointments Clause, which authorizes the President, the courts, and department heads, but not Congress or regional bodies, to make such appointments. U.S. Const. Art. II, § 2, cl. 2. In addition, under the Incompatibility Clause, Art. I, § 6, cl. 2, Members of Congress may not hold any office charged with performing such functions. Both the Appointments Clause and the Incompatibility Clause establish affirmative limitations on who can oversee the Airports Authority’s actions, which reinforce the limitations imposed on Congress by the bicameralism and presentment requirements and the doctrine of separation of powers.

To avoid these constitutional limitations, petitioners contend that Congress can give itself a veto power simply by making it a condition to a transfer of federal property. Thus, petitioners rely on *South Dakota v. Dole*, 483 U.S. 203 (1987), which held, that even if Congress could not establish a national minimum drinking age, it could require the states to raise their drinking ages as a condition of receiving federal funds. However, as the Court of Appeals held, Congress’s Spending and Property Clause powers do not permit it “to circumvent

the functional constraints placed on it by the Constitution.” App. A at 14a. In *Dole*, the problem was the lack of direct congressional power under Article I, section 8, a problem that was cured by using Congress’s admitted power under the Spending Clause. Here, the problem is that the Constitution imposes affirmative limitations on the method by which Congress can affect legal rights and duties through the Bicameralism and Presentment Clauses, the doctrine of separation of powers, the Appointments Clause, and the Incompatibility Clause. Congress cannot evade these limitations by asking other entities to agree to be bound by Congress’s extra-constitutional lawmaking as a condition of obtaining federal property or funds.

Indeed, if Congress can require the establishment of this Board of Review as a condition of the transfer of the airports, then it could also have required the Airports Authority to submit its actions to the House of Representatives for a one-House veto. Similarly, if this power is upheld, Congress could acquire a veto over the operation of the national parks or the veterans hospitals by transferring those properties to local governments or private entities. Moreover, under the Spending Clause, Congress could control the operation of numerous federal programs, such as those run by the National Endowment for the Arts or the Legal Services Corporation, by transferring them to the states or private entities, which would agree to be bound by the judgments of a congressional committee. In essence, the Board of Review provisions provide a blueprint for evading the structural limits imposed on Congress by the Constitution and reinforced by this Court’s rulings in *Chadha*, *Springer*, and *Bowsher*.

B. The justiciability issues raised by petitioners in their second question presented, and discussed in less than one page in the petition, do not warrant this Court’s review, except

as necessary for the Court to satisfy itself that there is a case or controversy meeting the requirements of Article III. Both the District Court and the Court of Appeals rejected these arguments below, and in the Court of Appeals, petitioners urged the Court to decide the merits and relegated their justiciability defense to a footnote. Moreover, the United States, which is a frequent proponent of ripeness and standing arguments, concluded, after extensive discussion, that this challenge is ripe and that respondents have standing to bring it.

This case is ripe for review because it raises purely legal questions based on well-developed Supreme Court precedent, which will not be affected by the manner in which the veto is exercised in the future. Indeed, in the wake of *Chadha*, this Court has not waited for a legislative veto to be exercised before reviewing its effect on legislation containing it. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 & n.3 (1987). Moreover, the Board of Review’s veto authority is not a dormant power since it has been used to block one proposal by the Airports Authority. While the veto power has not been exercised to respondents’ specific detriment, its existence has inevitably shaped the Airports Authority’s actions and tainted the process by which the master plan was adopted.<sup>2</sup>

Respondents also have standing to challenge the Board of Review. Petitioners have never disputed that respondents are injured by noise, air pollution, and safety problems associated with flights to and from National Airport. There is also no dispute that, under the master plan, there will be increases in the number of passengers using National Airport and in the

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<sup>2</sup>It should be noted that a person who objected to an exercised veto would probably not meet the redressability aspects of standing because a successful challenge would deprive the Airports Authority of the power to undertake the vetoed action. See 49 U.S.C. App. § 2456(h).

number of day-time air carrier operations, J.A. 170-71, 314, 317-22, 328, and there will be several larger gates that can accommodate wide-bodied jets, which comply with the night-time noise restrictions, but which currently cannot use National Airport's facilities. J.A. 297, 389-90.

Invalidating the Board of Review will make it impossible for the Airports Authority to undertake the actions that are subject to the Board's veto power and that are necessary to expand the airport facilities in keeping with the master plan. As a result, respondents will be spared the additional noise that would otherwise be caused by the increase in day-time air carrier operations and the traffic congestion and air pollution that would result from the increase in the number of passengers using National Airport. In addition, without expansion of the airport facilities, respondents will not have to endure night-time noise from the wide-bodied jets that cannot fit into the existing gates at the Airport. For these reasons, respondents' injuries can be fairly traced to the master plan, and their injuries will be redressed by a ruling in their favor.

## CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari and then affirm the judgment below.

Respectfully submitted,

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DECEMBER 19, 1990

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No. 90-906

DEC 19 1990

JOSEPH F. SPANIOL, JR.  
CLERK

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In the Supreme Court of the United States  
OCTOBER TERM, 1990

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METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE,  
ET AL., RESPONDENTS,

UNITED STATES OF AMERICA,  
INTERVENOR-RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE UNITED STATES

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## **QUESTIONS PRESENTED**

The Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451 *et seq.*) requires, as a condition of leasing federally owned airports to a regional airports authority created by the Commonwealth of Virginia and the District of Columbia, that the airports authority create and appoint a Board of Review that has veto power over major authority actions and that consists entirely of Members of Congress.

The questions presented (in the order presented in the petition) are:

1. Whether the Board of Review is constitutional.
2. Whether the challenge to the Board of Review is justiciable.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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No. 90-906

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
ET AL., PETITIONERS

v.

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-27a) is not yet reported. The opinion of the district court (Pet. App. 29a-55a) is reported at 718 F.Supp. 974.

**JURISDICTION**

The judgment of the court of appeals was entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. Pet. App. 28a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Washington National and Washington Dulles International Airports are the only federally owned civilian airports in the nation. From the time they were opened until 1987, both airports were operated by the federal government. For many years before 1987, the government had considered ceding its operational control of these airports. Pet. App. 2a.

In December 1984, a federal advisory commission report suggested a long-term lease arrangement between the federal government and an independent regional airports authority. Pet. App. 2a-3a. In response, both Virginia and the District of Columbia enacted legislation authorizing creation of a regional airports authority capable of assuming operation of the two airports. *Id.* at 3a. See 1985 Va. Acts ch. 598; D.C. Regional Airports Authority Act of 1985, D.C. Law 6-67 (1985) (*reprinted at* Pet. App. 87a-106a, 119a-139a).

In 1986, Congress passed the Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451-2461) (the Airports Act) (*reprinted at* Pet. App. 60a-85a), which authorized the Secretary of Transportation to transfer operating authority over National and Dulles Airports to a local regional authority (the Airports Authority) under an extendable 50-year lease. In the statute, Congress recognized—among other factors—that all other major American civilian airports are operated by regional or local authorities; that the Executive Branch had recommended a transfer of authority to a local entity; and that control of National and Dulles Airports by a regional authority would facilitate timely improvements needed to meet growing demand. 49 U.S.C. App. 2451.

In the federal statute, Congress set out certain conditions that must be satisfied for the Secretary to enter into a lease of the two airports. 49 U.S.C. App. 2453(2), 2454(a) and (c), and 2456(a). The Airports Authority must have powers granted by Virginia and the District of Columbia, but must be an independent political subdivision constituted solely to operate the local airports. 49 U.S.C. App. 2456(a) and (b). The lease must require an approximately \$3 million annual payment to the United States Treasury by the Airports Authority. 49 U.S.C. App. 2454(b)(1). The Airports Authority must have a governing Board of Directors composed of members chosen by the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President, all but one of whom must reside in the Washington, D.C., metropolitan area. 49 U.S.C. App. 2456(e).

Of particular relevance to this case, the lease must also provide that the Airports Authority Board of Directors establish a Board of Review. The Board of Review members must be appointed by the Board of Directors from lists of Members of Congress serving on specified committees of the Senate and House of Representatives, and one Member at large from either body alternately. 49 U.S.C. App. 2456(f). These lists are to be submitted to the Board of Directors by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. The Board of Review is to be made up entirely of Members of Congress, but Members from Virginia, Maryland, or the District of Columbia are disqualified. 49 U.S.C. App. 2456(f)(1).

Also under the conditions set by Congress, the Airports Authority must submit various actions to the Board of Review for approval, including the Au-

thority's annual budget, issuance of bonds, adoption or repeal of regulations, and adoption or revision of any airport master plan. 49 U.S.C. App. 2456 (f)(4)(B). Any of these proposals may be implemented by the Airports Authority if not disapproved within 30 days by the Review Board. 49 U.S.C. App. 2456(f)(4)(C). If the Board of Review is barred from carrying out its functions as a result of a judicial order, the Airports Authority lacks power to take any of the actions it would otherwise be required to submit for review. 49 U.S.C. App. 2456(h).

2. In March 1987, the Secretary of Transportation entered into a lease with the Airports Authority; the lease was also signed by the Governor of Virginia and the Mayor of the District of Columbia. Pet. App. 163a-189a. The lease provided for establishment of a Board of Review, as described in the Airports Act. Pet. App. 175a-176a. The Airports Authority also adopted bylaws creating the Board of Review and giving it powers and functions consistent with the provisions in the Airports Act. Pet. App. 148a-162a.

In early April 1987, Virginia amended its prior legislation concerning the Airports Authority to provide explicit power for the Authority to establish a Board of Review. See 1987 Va. Acts ch. 665, § 5.5 (Pet. App. 111a). In June 1987, the District of Columbia similarly amended its earlier legislation to empower the Airports Authority to set up a Board of Review. See D.C. Regional Airports Authority Act of 1985 Amendment Act of 1987, D.C. Law 7-18, Act 7-32, § 3(c)(2) (Pet. App. 143a).

By September 1987, the Airports Authority had appointed the Board of Review. Pet. App. 6a. In March 1988, the Airports Authority submitted to the Board of Review a new Master Plan for National

Airport. The following month, the Board of Review voted not to disapprove it;<sup>1</sup> the Airports Authority has begun implementation of the Plan and has sold bonds in order to finance construction. Pet. App. 6a, 36a. The Master Plan provides for construction at National Airport which will, among other benefits, make it possible for the airport to accommodate larger and more airplanes. *Id.* at 41a. The size of the terminals and parking facilities will be significantly expanded. *Ibid.*

3. In November 1988, respondents Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), *et al.* filed suit against petitioners, contending that the construction called for by the Master Plan would lead to an increase in National Airport "noise levels and safety and environmental problems" injurious to them and to CAAN's members. C.A. App. 12. Plaintiffs argued that, because the Board of Review is composed of Members of Congress, the Board's power to oversee the Airports Authority violates several constitutional provisions and the separation of powers doctrine. *Ibid.* Plaintiffs therefore sought a declaration that the Board of Review's authority under 49 U.S.C. App. 2456(f)(4) is unconstitutional and void, and an injunction preventing the Airports Authority from implementing the National Airport Master Plan. C.A. App. 13.

4. In July 1989, the district court granted summary judgment to petitioners. Pet. App. 55a. The court first ruled that the case was ripe, despite the fact that the Board of Review's veto authority had not been exercised with respect to the Master Plan. *Id.* at 37a-38a. The court also concluded that plain-

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<sup>1</sup> The Board of Review has exercised its veto power on only one occasion—involving a matter not related to the claims here. Pet. App. 38a.

tiffs had standing because an increase in air traffic at National Airport could not occur without the improvements provided by the Master Plan. *Id.* at 39a-42a. Alternatively, the court found standing because plaintiffs' influence over decisions regarding National Airport had been diminished by the ban against local representation among the Members of Congress on the Board of Review. *Id.* at 42a-43a.

The district court then upheld the validity of the Airports Act. The court noted that the statute explicitly provides that the Board of Review members serve in their individual capacities (49 U.S.C. App. 2456(f)(1)), and that the Airports Authority can remove them. Pet. App. 46a-47a. It determined that the Board of Review is therefore not an agent of Congress for separation of powers purposes. *Id.* at 46a-50a. The district court further found that both Virginia and the District of Columbia voluntarily created the Airports Authority and entered into the lease with the federal government. *Id.* at 51a. Accordingly, the Board of Review "derives its existence from state law, not federal law." *Ibid.* The court thus concluded that, in view of the state law character of the Airports Authority and Board of Review, there was no conflict with constitutional requirements for federal offices and for the exercise of federal power. *Id.* at 51a-54a.

5. Plaintiffs appealed, and the Attorney General intervened on behalf of the United States to defend the statute. The District of Columbia Circuit reversed the judgment of the district court.

The majority first rejected the argument that the Board of Review is not exercising federal power. The court emphasized that the Virginia and District of Columbia authorizing statutes do not spell out the powers and functions of the Board of Review in detail; instead, the federal Airports Act contains spe-

cific requirements concerning the Board. Pet. App. 10a-13a, 16a-18a. The court concluded that the Board of Review carries out "significant authority pursuant to the laws of the United States" (*id.* at 10a), because the federal statute required creation of the Board of Review. *Id.* at 10a-11a.

Having determined that federal power was being exercised, the court held that "the Board of Review, as currently constituted, unconstitutionally vests executive functions in an agent of Congress" (Pet. App. 19a), because (1) the members of the Board of Review are implementing executive functions and (2) they are subject to congressional control. The court emphasized that, in its view, Congress retained removal power because it could remove the members from the pertinent congressional committees. *Id.* at 13a-18a.<sup>2</sup>

Judge Mikva dissented. He questioned the court's characterization of the Board as a federal entity and concluded that "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." Pet. App. 22a. Judge Mikva then concluded that, even if the entity is exercising federal power, it is not unconstitutional. *Id.* at 22a-26a. Judge Mikva also disagreed with the majority's removal analysis. He concluded that the Airports Act should be read to vest removal authority with the Board of Directors both because the appointment authority lies with that Board, and because statutes should be construed to avoid constitutional problems. *Id.* at 24a-26a.

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<sup>2</sup> Despite its holding, the court also "direct[ed] \* \* \* that actions taken by the Board to this date not be invalidated automatically on the basis of [the court's] decision." Pet. App. 19a (citing *Buckley v. Valeo*, 424 U.S. 1, 142 (1976)).

## DISCUSSION

1. This case clearly warrants review. An important provision of a federal statute has been declared unconstitutional and invalidated. The case raises significant issues of separation of powers, federalism, and the character and scope of federal authority. It also has substantial practical consequences. The decision is likely to have an impact on all who use National and Dulles Airports, as well as on all who live in the surrounding areas. Moreover, large sums of money have already been spent pursuant to the current operating regime of the airports.

2. The justiciability issues raised by petitioners in their second question also merit this Court's review. Although we believe the case is justiciable, these important threshold questions are not free from difficulty and should therefore be briefed and argued by the parties.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1990

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\* The Solicitor General is disqualified in this case.

JAN 9 1991

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, *et al.*,

*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT  
NOISE, INC., *et al.*,

*Respondents.*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

**Petition For A Writ Of Certiorari To The United States  
Court Of Appeals For The District Of Columbia**

**BRIEF OF THE COMMONWEALTH OF VIRGINIA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICUS CURIAE

The decision of the United States Court of Appeals for the District of Columbia is without precedent in holding unconstitutional under the separation of powers doctrine legislation enacted by the Commonwealth of Virginia (the "Commonwealth") that created a board of review drawn from members of Congress acting in their individual capacities to exercise limited executive responsibilities regarding a state-created nonfederal body. That decision undermines the concept of federalism by either ignoring, or simply treating as fictional, the fact that the board of review derives all of its powers directly from bylaws adopted by the board of directors of the state-created Metropolitan Washington Airports Authority (the "Authority") under grants of legislative authority found in the nearly identical statutes of the Commonwealth and the District of Columbia.

In the years following construction of both the Washington National Airport in 1947 and the Washington Dulles International Airport in 1962, there had been several earlier attempts at securing a defective local voice in the management, planning and operation of these formerly federally owned airports. Each of these attempts had engaged the interest of the Commonwealth. At the same time, the Commonwealth has always recognized that the airports, while profoundly affecting the residents and economy of its most populous region, are truly unique as the nation's premier gateways to its capital. The struggle to reconcile these national and local aspects of the airports began to bear fruit in 1984 when the federal Secretary of Transportation (the "Secretary")

appointed an Advisory Commission on the Reorganization of the Metropolitan Airports chaired by former Virginia Governor Linwood Holton. The Commission's consensus on how best to balance important local, state, regional and national user interests was reported to Congress. *See S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985).* The report recommended that the federal airports be leased as a unit to an independent regional authority created by the concerted legislative actions of the Commonwealth and the District of Columbia.

The Commonwealth immediately responded to this proposal by enacting a law that created a regional airports authority empowered to acquire both Washington National and Washington Dulles International Airports from the federal government. Ch. 598 §§ 2-3, 1985 Va. Acts 1095, 1096, *reprinted in App. 88a-89a (1990)*. Shortly thereafter, the District of Columbia enacted a parallel ordinance. District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67 (App. 119a). Subject to a congressional enactment authorizing the transfer of the airports, this state legislation brought into being the Authority as a "public body corporate and politic" which, from its inception has been "independent" of all state and governmental bodies. 1985 Va. Acts, *supra*. Again from its inception, the Authority has been empowered to acquire the airports from the federal government by lease, and the Commonwealth has affirmatively indicated assent to such conditions as Congress thereafter might propose not inconsistent with the act's terms, subject only to approval of the creating jurisdictions' nonfederal chief executive officers. *Id.*

The following year, Congress gave its consent to the legislation of the Commonwealth and the District of Columbia in the Metropolitan Washington Airports Act of 1986 ("Transfer Act"). App. 60a (quoting 49 U.S.C.A. app. § 2451 (West Supp. 1990)); *see S. Rep. No. 193, supra*, at 12. The Transfer Act authorized the Secretary to negotiate a 50-year lease with the state-created independent Authority that would include certain conditions specified by Congress. 49 U.S.C.A. app. § 2454 (West Supp. 1990).

While the Authority was to have only those powers conferred upon it by the legislative bodies of the Commonwealth and the District of Columbia (49 U.S.C.A. app. § 2456(a) (West Supp. 1990)), in order to provide user input to an authority concededly dominated by local interests, Congress specified that the participating jurisdictions should create under state law a board of review representing users to be appointed by the Authority's own board of directors from a list of members of Congress. The state-created Authority's board of directors is empowered to reject any candidate-member on the list provided by the Speaker of the House and the President *pro tempore* of the Senate and to request alternate names. Again, to balance the board of directors' regional character, no member of Congress from Virginia or the District of Columbia is permitted to serve on the board of review. 49 U.S.C.A. app. § 2456(f)(1) (West Supp. 1990).

On March 2, 1987, the state-created Authority successfully completed negotiations with the Secretary and entered into lease terms consistent with both the state legislation and the Transfer Act. *See Lease of the Metropolitan Washington Airports between The United States*

of America, etc. and The Metropolitan Washington Airports Authority (App. 163a).

Both Virginia and the District of Columbia then expressly authorized the establishment of the board of review by enacting amendments to their earlier, nearly identical statutes that had created the Authority. Ch. 665 § 5(A)(5), 1987 Va. Acts 1138, 1140 (Reg. Sess.), reprinted in App. 110a-11a; D.C. Law 7-18 § 3(c)(2) (1987), reprinted in App. 142a-43a.

It is thus apparent that the Commonwealth's law both created, and now permeates and sustains, every aspect of the Authority, including its board of review.

The profound effect of the Authority's airports on the economy of the Northern Virginia community and, indeed, that of the entire Commonwealth requires little elaboration. As of 1987, the airports served the sixth largest passenger market in the United States and the airport system represented the nation's eighth largest in terms of passenger emplanements. The airports are among the largest generators of employment in the Commonwealth. The Washington Dulles International Airport has a total employee population of 10,684 (as of January 1, 1990) while the Washington National Airport has a like population total of 10,333 (as of June 1, 1990). Again, in 1987, more than \$3.2 billion of business activity was generated by the activities of the two airports, which included more than \$468 million paid out in wages and salaries to those holding jobs directly dependent upon the airports' activity. Approximately \$81 million of state and local taxes were generated by passenger and freight activity at the airports.

The indirect effects on the regional and state economy of these airports tell a similarly impressive story. No imagination is required to comprehend the staggering economic impact that resulted in 1987 alone from the 6.7 million visitors who arrived in the Washington metropolitan area by way of these airports.

Accordingly, given the potential for disruption of normal airport operation, planning and development posed by the decision rendered by the court of appeals, the Commonwealth supports the Authority in urging this Court to review that decision. Moreover, the Commonwealth itself is deserving of a full *amicus* opportunity to discuss the merits of the court of appeals' unprecedented conclusions concerning a state's right to engage voluntarily members of Congress in nonfederal service by so providing in its own law.

#### SUMMARY OF ARGUMENT

The court of appeals' decision fails to appreciate the significant and determinative role played by state legislation in the creation of every aspect of the Authority's powers and duties, including those of its board of review. It mistakenly carves out a role for Congress in the creation of the board of review that is contrary to its actual legislative and political history.

There is no constitutional prohibition on Congress' establishing a condition to which a state may voluntarily agree in order to acquire federal property. Moreover, state legislative adjustments made to reach accord with the federal executive along lines approved by Congress are

routine. Heretofore, no authority implicitly has held that the resulting state legislation is thus transformed into federal legislation.

The decision below overlooks the sensitive notion of federalism in holding unconstitutional under the separation of powers doctrine a state-created nonfederal review body whose members, though appointed from lists supplied by Congress, may be removed solely by the state-created authority that appoints them. The decision is thus unique in holding that states may not constitutionally legislate to employ the service of members of Congress in state-created nonfederal political bodies.

Whatever the prohibitions attending the exercise of federal executive authority by members of Congress, those prohibitions have not been demonstrated by logic or precedent to have automatic relevance to such exercise of nonfederal executive authority.

The delicate balance reached by sovereign governments in order to address the serious transportation needs of the region has been upset by the complaint of the respondents, a private citizens' group, even though the relief requested does nothing to address respondents' actual concerns.

Solving regional issues, including serious transportation needs, has required innovative approaches within our federalist framework for more than two centuries, and it doubtless will require more of the same as a new century dawns.

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## ARGUMENT

Remarkably, the decision of the court of appeals fails to appreciate the essential legislative roles played by the Commonwealth and the District of Columbia in the creation of every aspect of the Authority's powers and duties, including those of its board of review. Although the opinion acknowledges that Virginia and the District of Columbia could have refused the "deal offered by Congress," it fails to appreciate the full significance of this concession (App. 11a).

This characterization of the Commonwealth's role in the creation of the Authority misapprehends the actual legal genesis of the Authority and its board of review.

Contrary to the court of appeals' decision, Congress did not offer any "deal" to the Commonwealth; Congress merely authorized the Secretary to engage in negotiations with the independent state-created Authority for purposes of concluding lease terms transferring airport ownership to the Authority that would derive its jurisdiction and powers from nonfederal legislative authorities. 49 U.S.C.A. app. § 2456(a). The Secretary was not mandated to conclude a lease, and the decision to do so was clearly her decision and that of the Authority, and not that of Congress. Accordingly, the decision of the court of appeals carves out a role for Congress in the creation of both the Authority and its board of review that cannot be squared with the Authority's actual legislative and political history.

That Congress chose to attach reasonable conditions to any transfer of the airports out of federal ownership is hardly remarkable from the Commonwealth's perspective. The Commonwealth is accustomed to having to meet

a variety of conditions established by Congress. As this Court has so often noted, when a state chooses to meet such conditions, it does so voluntarily. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Clearly, that was the case here.

It is also not remarkable for a state to alter its own law in order to reach an accord with the federal executive along the lines that Congress has authorized. *Id.* Nevertheless, according to the logic of the opinion below, in every such case, the resulting state legislation is "federalized" simply because it is in harmony with an authorizing congressional enactment.

The court of appeals' decision neglects to consider whether there is not some sensitivity surrounding the notion of federalism in holding unconstitutional under the separation of powers doctrine a state-created non-federal body composed of certain members of Congress who sit "in their individual capacities, as representatives of users" (49 U.S.C.A. app. § 2456(f)(1)), and who may be removed by the state-created body that appoints those representatives (App. 26a). That decision thus implicitly holds that states may not constitutionally legislate to employ the services of members of Congress in state-created nonfederal political bodies. Assuming, for argument's sake, that this conclusion may yet prove correct, it certainly deserves a supporting opinion conscious of its novelty and sensitive to its broader implications for our system of federalism.

That Congress may have induced the Commonwealth to do something voluntarily which it would not otherwise have done is far from unprecedented in the annals of federal-state relations or even worthy at this historical juncture of serious constitutional concern. *Dole*, 483 U.S.

at 203. Whatever the contours of prohibitions attending the exercise of federal executive authority by members of Congress, they have no automatic relevance to such exercise of nonfederal executive authority. *Kwai Chiu Yuen v. Immigration and Naturalization Service*, 406 F.2d 499 (9th Cir.), cert. denied, 395 U.S. 908 (1969).

A delicate balance had been reached by both the legislative and executive branches of state and federal government in order to address the serious transportation needs of the Washington metropolitan area. Solving issues that transcend the borders of a single state and embrace the legitimate concerns of more than one sovereign has required innovative approaches within our federalist framework for the past two centuries, and it will doubtless require more of the same as the nation enters a new century. It would be ironic if the complaint of a private citizens' group were permitted to undo the carefully crafted political framework of sovereign governments, even though the relief so requested and granted that group does nothing to address its underlying noise and safety concerns.

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## CONCLUSION

No opinion cited in the decision of the court of appeals addresses whether a state may secure through its own law the nonfederal service of a member of Congress. While the decision of the court of appeals does not expressly acknowledge this holding, it clearly reaches

this result. Moreover, it does so with no apparent appreciation for how it may affect the broader existing framework of state government and without even an articulable answer to the question of how such a holding can possibly benefit the citizens' group that urged it.

*Amicus* respectfully urges this Court to grant the petition for writ of certiorari.

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FILED  
MAR 1 1991

No. 90-906

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Petitioners*,  
v.

CITIZENS FOR THE ABATEMENT OF  
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*Respondents*,

UNITED STATES OF AMERICA,  
*Intervenor.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED DECEMBER 10, 1990  
CERTIORARI GRANTED JANUARY 14, 1991

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**CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES**

DATE	PROCEEDINGS
November 16, 1988	—Complaint filed in the United States District Court for the District of Columbia.
December 16, 1988	—Answer filed.
December 20, 1988	—Motion by plaintiffs for summary judgment filed.
January 30, 1989	—Cross Motion by defendants for summary judgment and opposition to plaintiffs' motion for summary judgment filed.
February 14, 1989	—Reply Memorandum by plaintiffs in support of motion for summary judgment and in opposition to defendants' cross motion for summary judgment filed.
February 27, 1989	—Reply Memorandum by defendants in support of cross motion for summary judgment and in opposition to plaintiffs' motion for summary judgment filed.
April 19, 1989	—Notice filed by plaintiffs of case in United States District Court for the District of Columbia— <i>Federal Fire Fighters Association, Local 1, et al. v. United States, et al.</i> , Civil Action No. 88-1022-LFO—involving common issue of law.
June 5, 1989	—Notice filed by defendants of order by court staying consideration of the identical constitutional issue in case involving common issue of law.
July 20, 1989	—Memorandum Opinion and Order by Judge Joyce H. Green denying motion for summary judgment by plaintiffs and granting cross motion for summary judgment by defendants.
August 3, 1989	—Notice of Appeal filed by plaintiffs from order entered July 20, 1989.

DATE	PROCEEDINGS
October 24, 1989	—Motion filed by the Attorney General of the United States to exercise his statutory right to intervene as a full party in the United States Court of Appeals for the District of Columbia Circuit.
December 1, 1989	—Brief for appellants filed in the United States Court of Appeals for the District of Columbia Circuit.
January 17, 1990	—Brief for the United States filed.
January 30, 1990	—Brief for appellees filed.
February 26, 1990	—Reply Brief for appellants filed.
October 26, 1990	—Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the district court's ruling.
November 19, 1990	—Unopposed Motion of appellees for stay of mandate and effective date of opinion and order filed in the United States Court of Appeals for the District of Columbia Circuit.
December 6, 1990	—Order entered staying issuance of mandate and effective date of court's opinion and order.
December 10, 1990	—Petition for Writ of Certiorari filed.
December 19, 1990	—Respondents' Brief in response to petition for a writ of certiorari filed.
December 19, 1990	—Brief for the United States filed.
January 9, 1991	—Brief of the Commonwealth of Virginia as <i>amicus curiae</i> in support of petitioners filed.
January 14, 1991	—Petition for Writ of Certiorari granted.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 88-3319

JOYCE GREEN, J. JHG

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC.,  
2001 O Street, N.W.  
Washington, D.C. 20036,

JOHN W. HECHINGER, SR.,  
2838 Chain Bridge Road, N.W.  
Washington, D.C. 20016,

and

CRAIG H. BAAB,  
4404 Greenwich Parkway, N.W.  
Washington, D.C. 20007,

*Plaintiffs,*

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
Hangar 9  
Washington National Airport  
Washington, D.C. 20001,

and

BOARD OF REVIEW,  
Metropolitan Washington Airports Authority,  
Hangar 8  
Washington National Airport,  
Washington, D.C. 20001,  
*Defendants.*

---

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

[Filed Nov. 16, 1988]

1. This action seeks a declaration that the review of certain actions of the defendant Metropolitan Washington Airports Authority by a Board of Review composed of nine Members of Congress is unconstitutional. It also seeks an order enjoining the Board of Review from exercising its review authority and enjoining the Metropolitan Washington Airports Authority from performing any of the actions that are required to be submitted to the congressional Board of Review.

**JURISDICTION**

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 & 1343.

**PARTIES**

3. Plaintiff Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN") is a non-profit membership organization composed of citizens' groups and individuals from the District of Columbia, Virginia, and Maryland, most of whom live under flight paths to and from Washington National Airport. It is incorporated in Maryland, but has its principal place of business in the District of Columbia. Its primary purpose is to develop and implement a rational transportation policy for the Metropolitan Washington D.C. area, which would include balanced service at the area's three airports, reduce aircraft operations at Washington National Airport, and alleviate the noise, safety problems, and air pollution that result from such operations. In order to further the community interest in health, safety, and environmental improvements at National Airport, CAAN advocates its positions before defendant Metropolitan Washington Airports Authority.

4. Plaintiff John W. Hechinger, Sr., is a member and honorary co-chairman of CAAN. He resides in the flight path of airplanes going to and from Washington National Airport and is adversely affected by noise, vibrations, and the environmental consequences of the air traffic going to and from that airport. For two decades, he has been an advocate for reducing noise at Washington National Airport both as Chairman of the Council of the District of Columbia during 1967-1969 and as a private citizen.

5. Plaintiff Craig H. Baab resides in the flight path of airplanes going to and from Washington National Airport and is adversely affected by the noise, safety problems, and environmental consequences of overflights. He is concerned that airplanes that routinely fly at low elevations over his neighborhood present safety problems that increase as the level of air traffic increases.

6. Defendant Metropolitan Washington Airports Authority ("Airports Authority") is a public body that was established by chapter 598 of the 1985 Virginia Acts of Assembly, as amended by chapter 665 of the 1987 Virginia Acts of Assembly, and the District of Columbia Regional Airports Act of 1985, D.C. Code §§ 7-1501-7-1511, in accordance with the terms of the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, 99th Cong., 2d Sess. (1986) ("Airports Act"), to operate and improve the Metropolitan Washington Airports, i.e., Washington National Airport and Washington Dulles International Airport. On June 7, 1987, it assumed operating responsibility for the Metropolitan Washington Airports. Its offices are located at Washington National Airport.

7. Defendant Board of Review of the Airports Authority is composed of nine Members of Congress appointed by the Board of Directors of the Airports Authority from lists supplied by the Senate and House of Representatives. It has the power to veto certain major

actions of the Airports Authority as described in paragraphs 12 and 13 below.

#### STATUTORY SCHEME

8. The Airports Act authorized the transfer of operating responsibility for the Metropolitan Washington Airports from the Federal Aviation Administration ("FAA") to the Airports Authority. 49 U.S.C. §§ 2452, 2454.

9. Under section 2456(c) of the Airports Act, D.C. Code § 7-1506(c), and 1987 Virginia Acts, ch. 665, § 5, the Airports Authority has the power to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes, to issue bonds, to acquire real and personal property, to levy fees and other charges, and to make agreements with employee organizations.

10. The Airports Authority is governed by an eleven-member Board of Directors, which is composed of five members appointed by the Governor of Virginia, three members appointed by the Mayor of the District of Columbia, two members appointed by the Governor of Maryland, and one member appointed by the President with the advice and consent of the United States Senate. 49 U.S.C. § 2456(e)(1); D.C. Code § 7-1506(e)(1); 1987 Virginia Acts ch. 665, § 4(A). The Board members serve for staggered six-year terms, except that most of the initial terms are of shorter duration. 49 U.S.C. § 2456(e)(3); D.C. Code § 7-1506(e)(3); 1987 Virginia Acts ch. 665, § 4(C).

11. The Airports Act also created a nine-member Board of Review to be appointed by the Airport Authority's Board of Directors. 49 U.S.C. § 2456(f). Under the Airports Act, all of the members of the Board of Review must be Members of Congress, selected from lists provided by the Speaker of the House and President pro tempore of the Senate. They must include two members

of the House Public Works and Transportation Committee, two members of the House Appropriations Committee, two members of the Senate Commerce, Science, and Transportation Committee, two members of the Senate Appropriations Committee, and one member chosen alternately from the House and the Senate. *Id.* § 2456(f)(1). The Airports Act states that the Board of Review members serve "in their individual capacities, as representatives of users of the Metropolitan Washington Airports," but it prohibits Senators and Representatives from Maryland and Virginia and the District of Columbia Delegate from serving on the Board of Review. *Id.* The Board of Review members serve staggered six-year terms, except that most of the initial terms are of shorter duration and the alternating member serves a two-year term. *Id.* § 2456(f)(2).

12. Any actions of the Board of Directors that (1) adopt an annual budget, (2) authorize the issuance of bonds, (3) adopt, amend, or repeal a regulation (which includes all changes in the hours of operation and types of aircraft serving either of the airports, *id.* § 2456(g)), (4) adopt or revise a master plan, including any proposal for land acquisition, or (5) appoint the chief executive officer, cannot go into effect if the Board of Review disapproves them. *Id.* § 2456(f)(4).

13. The Board of Directors must submit any actions of the kind described in paragraph 12 to the Board of Review at least 30 days before they are to become effective, with the exception of the annual budget, which must be submitted at least 60 days before it is to become effective. *Id.* § 2456(f)(4)(A). If five members of the Board of Review disapprove any of the actions described in paragraph 12 within 30 days of their submission, such actions shall not take effect. *Id.* § 2456(f)(3) & (4). On August 9, 1988, the Board of Review exercised its veto power to nullify an Airports Authority regula-

tion that would have allowed car pools to use the Dulles Access Road for one year.

14. In addition to its power of disapproval, the Board of Review may ask the Airports Authority to consider, vote, or report on any matter "related to" either National or Dulles airport, and the Airports Authority has a statutory obligation to comply with any such request as promptly as feasible. *Id.* § 2456(f)(3) & (5). Members of the Board of Review may also participate as nonvoting members at all meetings of the Airports Authority's Board of Directors. *Id.* § 2456(f)(6).

15. Section 2456(h) of the Airports Act provides that, if the Board of Review is unable to carry out its functions by reason of a judicial order, the Airports Authority shall have no authority to perform any of the actions that are subject to disapproval by the Board of Review.

#### AIRPORTS AUTHORITY PROCEEDINGS

16. In October 1987, the Airports Authority proposed a master plan for National Airport.

17. In November 1987, CAAN submitted comments to the Airports Authority on the master plan for National Airport, in which CAAN objected to the planned introduction of wide-bodied aircraft and the overall expansion of National Airport facilities to accommodate an increase in the level of passenger activity. CAAN also criticized the absence of a comprehensive analysis of environmental impact, the disregard of safety concerns, and the failure to reduce (and the likelihood of an increase in) the amount of aircraft noise, in part, because CAAN believes the Master Plan will lead to an increase in nighttime flights.

18. In March 1988, over CAAN's opposition, the Airports Authority approved the master plan for National Airport, which makes no provision for reducing noise levels, and provides for expanding the airport's capacity.

The Airports Authority can put this plan into operation only if it has the powers, which are subject to disapproval by the Board of Review, to raise and budget funds for this purpose.

19. On April 13, 1988, four members of the Board of Review met and voted not to disapprove the master plan. Thereafter, the Airports Authority implemented the master plan by entering into construction contracts and beginning construction at National Airport.

20. In March 1988, the Airports Authority issued its first bonds series to fund improvements at Washington National and Dulles Airports. It has since issued three additional bonds series for such improvements. The Board of Review did not veto the issuance of any of these bonds series.

21. Because the congressional Board of Review excludes representation from the metropolitan Washington D.C. area, and yet it wields ultimate control over the Airports Authority, it has diminished the influence that CAAN and its members have over decisions concerning the operation of the airports, which were previously made by Congress and/or the FAA.

#### CAUSE OF ACTION

22. The Board of Review's power under 49 U.S.C. § 2456(f)(4) to disapprove actions of the Airports Authority violates the bicameralism requirement of Article I, §§ 1, 7, the Presentment Clauses, Article I, § 7, cl. 2-3, and the doctrine of separation of powers.

23. Since the Board of Review cannot constitutionally exercise its veto power, the Airports Authority does not have the authority under the Airports Act, because of the operation of section 2456(h) set forth in paragraph 15, to perform any of the actions subject to review. As a result, the Airports Authority may not, consistent with the Airports Act and 42 U.S.C. § 1983, implement its

Master Plan, which is now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future.

#### RELIEF

Wherefore, plaintiffs pray for an order and judgment

(1) declaring that the Board of Review's authority under 49 U.S.C. § 2456(f)(4) to disapprove actions of the Airports Authority is unconstitutional and void because it violates the bicameralism requirement of Article I, §§ 1, 7, the Presentment Clauses, Article I, § 7, cl. 2-3, and the doctrine of separation of powers;

(2) enjoining the Board of Review from exercising its review authority and from taking any other actions under the Airports Act;

(3) declaring that the Airports Authority is forbidden from implementing any of the actions that are required to be submitted to the Board of Review and enjoining it from implementing the Master Plan approved by it in March 1988;

(4) awarding plaintiffs their attorneys' fees and costs; and

(5) granting such other and further relief as the Court deems just and proper.

/s/ Patti A. Goldman  
PATTI A. GOLDMAN  
D.C. Bar No. 398565

/s/ Alan B. Morrison  
ALAN B. MORRISON  
D.C. Bar No. 073114

/s/ Eric R. Glitzenstein  
ERIC R. GLITZENSTEIN  
D.C. Bar No. 358287

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(202) 785-3704  
Attorneys for Plaintiffs

November 16, 1988

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 2**

**ADVISORY COMMISSION ON THE  
REORGANIZATION OF THE  
METROPOLITAN WASHINGTON AIRPORTS**

**REPORT TO THE SECRETARY  
DECEMBER 18, 1984**

**I. Introduction**

The Secretary of Transportation created this Advisory Commission on June 18, 1984 and charged it with developing a proposal for transferring the Metropolitan Washington Airports (MWA), Washington National and Washington Dulles International, from federal ownership to a state, local or interstate public entity. It is important to understand that she did not ask us to determine *whether* the airports should be transferred, but *how* they should be transferred.

The transfer idea is not a new one. The government's venture in operating air carrier airports began when National Airport opened for business in 1941. By 1948, the Airport was identified as inappropriate for operation as a conventional federal agency, and the Hoover Commission recommended that it be turned over to a government corporation in 1949.

In the following thirty-five years, many attempts were made to reorganize first National, and later both National and Dulles into a government corporation. In the late 1960s, the alternative of local control was considered.

Although the idea of transfer is not new, Secretary Dole's approach to the issue is: She asked a commission comprised of the parties principally interested in the operation of the Metropolitan Washington Airports to recom-

mend how the airports should be transferred. Her approach reflects a recognition that transfer is essentially a political issue which requires a broad consensus for success.

The Commission has diligently sought to find a middle ground that best serves the public interest and meets the concerns of the several jurisdictions the Airports serve, the users of the Airports, and the Congress, which must authorize transfer. Although we have not been able to reach unanimous agreement on all points, we have agreed on many of the basics and hope that the Secretary will be able to fashion a workable proposal to the Congress on the basis of our efforts.

Finally, the Commission recognizes that its report is necessarily general, and anticipates that the Secretary will provide more detail in her legislative proposal to the Congress.

**II. The Commission's Deliberations**

The Commission held seven public meetings, all at the Department of Transportation Headquarters Building, and a public hearing at the Federal Aviation Administration auditorium.<sup>1</sup>

Early meetings were devoted to defining the scope of the Commission's concerns. A survey of existing authorities capable of acquiring and operating the Airports found a number of agencies with sufficient authority, but none able to balance the interests of the three jurisdictions without further legislation. Moreover, none of the candidate authorities, excepting only the Maryland State Aviation Administration, had any experience with the operation of airports. The Commission quickly concluded that a new authority should be created to operate the

<sup>1</sup> Meetings were held July 25, August 7, October 17, November 7, November 29, December 13 and December 18. The public hearing was held September 12.

Airports, so that it could be tailored to meet the needs of the metropolitan area.

The Commission also received a summary report on the structure of several existing airport authorities, and focused its attention on two well-known and successful authorities whose facilities serve several jurisdictions: the Port Authority of New York and New Jersey, which operates the three major air carrier airports in the New York metropolitan area, and the Kenton County Airport Board, a Kentucky-based agency that operates the Greater Cincinnati International Airport.

Speakers from both authorities appeared at the October 17 meeting.<sup>2</sup> The Cincinnati airport, located across the Ohio River in Kentucky, is owned and operated by a Kentucky municipal agency. The Airport Board, consisting of six members who are residents of Kentucky, and the Advisory Board, consisting of eight members who are residents of Ohio, meet as a single board. Because of restrictions in Kentucky law, only the Airport Board members may vote.

The Port Authority, an interstate compact agency created in 1921, undertook operation of the New York area airports in 1948. It is governed by a twelve-member Board of Commissioners, six appointed by the Governor of New York and six by the Governor of New Jersey. Each Governor has the right to veto Board actions.

Although the Commission concluded that neither authority provided the ideal model for a Metropolitan Washington Airports authority, their presentations provided useful advice on how to address interstate concerns. And despite considerable differences in the structure and ex-

<sup>2</sup> Patrick J. Falvey, General Counsel and Assistant Executive Director, and Dr. William J. Ronan, a Commissioner, addressed the Commission on the Port Authority's experiences; William C. Whitson, Chairman, and Wilbert Ziegler, General Counsel, discussed the organization and history of the Kenton County Board.

perience of the two authorities, their representatives agreed on major points. They both emphasized the importance of an independent board with distinguished members, and recommended that they not receive compensation.

The Commission also received financial advice from Wheat, First Securities of Richmond and Salomon Brothers of New York in the form of a report (copy attached) and several presentations. In sum, the report concluded that an independent Metropolitan Washington Airports Authority would be self-sustaining, and capable of financing major improvements at both National and Dulles at favorable rates through issuance of tax-exempt revenue bonds, without appropriation of federal or state funds. Later meetings were devoted to discussion and debate of the principal issues, as described below.

### *III. Issues and Recommendations*

The Commission identified the following issues, and the majority reached a consensus on them as follows:

#### **A. Single Authority**

Washington National and Washington Dulles International Airports should be transferred by the Congress to a single, independent public authority to be created jointly by the Commonwealth of Virginia and the District of Columbia, with the capacity to issue tax exempt revenue bonds to finance improvements at both airports.

The Commission inquired into the possibility of transferring the two airports separately, but financial analysis shows that separating them would require such "substantially higher landing fees and terminal rentals" at Dulles that "may put [it] at a competitive disadvantage." In addition, the Commission believes that for operational effectiveness, promotion and economic development, and service to travellers, the two airports should be coor-

dinated by a single management, as they have been in the past.

Independence is critical because both airports serve the entire metropolitan region, and the authority therefore should not be an agency within any one state or local government.

The ability to issue tax-exempt revenue bond is an advantage critical to the transfer proposal. This enables an airport authority to finance capital improvements from private capital sources at a minimum cost.

The Maryland members of the Commission<sup>3</sup> agree with the majority with respect to revenue bonding authority, but believe that the Metropolitan Washington Airports should be separated. They recommend that Dulles be transferred to the Commonwealth of Virginia, while National be transferred to a tripartite authority with equal representation of Maryland, Virginia and the District of Columbia.

#### B. Conditions of Transfer

The transfer should be by long-term lease with only nominal consideration, on the condition that the new authority operate both National and Washington Dulles International as primary air carrier airports serving the metropolitan Washington area. Any revenues of the new authority should be expended only on Dulles and National airport facilities. The authority should assume any existing hypothetical debt of the MWA to the Treasury.

Valuation of airport property is a difficult business, as airports are rarely bought and sold. The Commission is satisfied that, however a market price might be determined, a public transferee willing to pay a substantial price for the Metropolitan Washington Airports is not available. Nevertheless, the Commission believes that a

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<sup>3</sup> Paul Sarbanes, Steny Hoyer, James Truby and Scott Fosler.

new airport authority should reimburse the federal government for the recoverable costs of past airport capital investments. This should be done on the same basis the Metropolitan Washington Airports has been repaying these costs to the Treasury. The existing debt stands at \$67.3 million. The new authority would make progress payments over a fixed period of not more than 35 years as part of its lease.

#### C. Governing Board

The authority should be governed by a single board of eleven members serving staggered six-year terms, five members to be appointed by the Governor of Virginia; three by the Mayor of the District of Columbia; two by the Governor of Maryland; and one by the President, with the advice and consent of the Senate. The board should elect a chair from among its members.

Members should not hold elective or appointive political office, should reside in the Washington Standard Metropolitan Statistical Area, and should serve without compensation. The residence requirement should not apply to the Presidential appointee.

A seven-vote majority should be required to approve bond issues and the annual budget.

The Commission has been most impressed with the need for a non-political, independent authority with a board able to reach decisions without consideration of extraneous issues. The conditions proposed on board membership are common to most successful airport authorities. The residency requirement is recommended to allay any concerns that either Governor might appoint members from other parts of the state who might have interests inconsistent with those of the Washington area.

Consistent with their overall position, the Maryland members dissent from the proposed allocation among the three jurisdictions of members of the board, though not from

the proposed restrictions on their appointment, or the choice of the governors and the mayor as appointing authorities. With respect to National Airport, they recommend three members appointed by each jurisdiction, with the possibility of two members to represent the Congress.\*

Mr. Ignatius, on behalf of the Air Transport Association, prefers an allocation of board members that would provide for a majority of the appointees from a single jurisdiction, and abstains with respect to the composition of the eleven-member board.

#### D. Employees

Pay levels, pensions and other benefits for present employees should be preserved.

The Commission has been impressed with the favorable reputation enjoyed by employees of the Metropolitan Washington Airports. Continuity will be required when the Airports change hands, and employees should be protected not only out of fairness to them, but to keep the airports functioning as efficiently as in the past.

For that reason, the new authority should provide a level of rights and benefits for the existing employees no less than what they are receiving at the time of transfer. To this end, the authority should be permitted to participate in the federal pension system with respect to present employees, or to develop an at least equivalent pension system of its own. MWA employees should retain any federal employment rights for a period of two years. An adequate transition period should be provided to assure that a complete pay and benefit package is developed before employees must elect between employment with the new authority and continuing federal employment.

The Maryland members do not dissent from this recommendation.

---

\* Mr. Fosler advocates an agreement based on the same board structure for a single authority operating both airports.

#### IV. Conclusion

The Commission therefore recommends to the Secretary of Transportation that she submit to the Congress legislation authorizing the transfer of the Metropolitan Washington Airports to an independent authority to be established by interstate compact between the Commonwealth of Virginia and the District of Columbia. The transfer should be made only if the two jurisdictions enact legislation establishing such an authority with the characteristics set forth above.

Respectfully submitted,

/s/ A. Linwood Holton, Jr.  
A. LINWOOD HOLTON, JR.  
Chairman

/s/ William J. Ronan  
WILLIAM J. RONAN

/s/ Franklin E. White  
FRANKLIN E. WHITE, for  
CHARLES S. ROBB  
Governor of Virginia

/s/ Pauline A. Schneider  
PAULINE A. SCHNEIDER, for  
MARION BARRY, JR., Mayor  
of the District of  
Columbia

/s/ John W. Warner  
United States Senate

/s/ Frank Wolf  
FRANK WOLF  
House of Representatives

/s/ Betty Ann Kane  
BETTY ANN KANE  
District of Columbia Council

/s/ Martha V. Pennino  
MARTHA V. PENNINO  
Fairfax County Board of  
Supervisors

/s/ Paul R. Ignatius  
PAUL R. IGNATIUS  
Air Transport Association

/s/ Duane H. Ewedahl  
DUANE H. EWEDAHL  
Regional Airline Association

/s/ John H. Winant  
JOHN H. WINANT  
National Business Aircraft  
Association

#### Attachments

Views of the Maryland Delegation  
Wheat, First & Salomon Brothers Analysis

CONGRESS OF THE UNITED STATES  
 HOUSE OF REPRESENTATIVES  
 Washington, D.C. 20515

Steny H. Hoyer  
 5th District, Maryland

Appropriations Committee  
 Treasury, Postal Service,  
 General Government  
 Labor,  
 Health and Human Services,  
 Education

To: MEMBERS, ADVISORY COMMISSION ON THE REORGANIZATION OF THE METROPOLITAN WASHINGTON AIRPORTS  
 FROM: CONGRESSMAN STENY HOYER, SENATOR PAUL SARBAKES, GOVERNOR HARRY HUGHES, COUNCILMAN SCOTT FOSLER  
 RE: ALTERNATIVE REPORT TO THE COMMISSION

These comments are offered in the interest of producing a report which contributes to achieving our shared objective, as outlined in the Commission's Charter: transferring National and Dulles airports to an appropriate state, local, or interstate body.

As we indicated during the December 13th Commission meeting, Governor Holton's efforts to "forge a solution" which reflects the interests of the Commission membership have been impressive. In this regard, we appreciate the Governor's openness to submitting a report to Secretary Dole which describes two approaches under which local control of National and Dulles could be exercised.

We concur with Secretary of Transportation Dole's premise that the Federal Aviation Administration should not be in the business of operating airports. We believe that the proposal submitted by Congressman Hoyer to transfer National Airport to an interstate authority and

Dulles International Airport to the State of Virginia is consistent with the Secretary's objectives of heightening local control over the two Washington Metropolitan Airports, as well as relinquishing federal control over the airports.

*Maryland strongly endorses the transfer of National Airport to an interstate authority and Dulles Airport to the State of Virginia. Under this approach, National would be leased to a nine member interstate authority with three members each from the District of Columbia, Virginia and Maryland, appointed by the Mayor of the District of Columbia and the two Governors. The National Airport Authority would have full policy, operating and financing authority.*

We are open to including one or two representatives of the Federal Government on the authority to recognize the Federal interest in the "Nation's Airport."

The members of the authority would serve staggered six year terms and would not hold elective or appointed political office, would reside in the Washington Metropolitan Area, and would serve without compensation. Employees of National Airport would be protected, and their pay levels, pensions and other benefits would be preserved.

Under our proposal, Dulles International Airport would be transferred to the State of Virginia. Employees of Dulles would be protected, and their pay levels, pensions and other benefits would be preserved. Virginia, of course, would have full policy and financing authority and responsibility once the transfer of Dulles has occurred.

This approach, we believe, reflects the significant interest of each of the principal jurisdictions in National Airport while allowing Virginia to develop Dulles in the same way Maryland is developing Baltimore-Washington International.

CONGRESS OF THE UNITED STATES  
 HOUSE OF REPRESENTATIVES  
 Washington, D.C. 20515

Steny H. Hoyer  
 5th District, Maryland

Appropriations Committee  
 Treasury, Postal Service,  
 General Government  
 Labor,  
 Health and Human Services,  
 Education

To: MEMBERS, ADVISORY COMMISSION ON THE REORGANIZATION OF THE METROPOLITAN WASHINGTON AIRPORTS

FROM: CONGRESSMAN STENY HOYER, SENATOR PAUL SARBANES, GOVERNOR HARRY HUGHES, COUNCILMAN SCOTT FOSLER

RE: ALTERNATIVE REPORT TO THE COMMISSION

These comments are offered in the interest of producing a report which contributes to achieving our shared objective, as outlined in the Commission's Charter: transferring National and Dulles airports to an appropriate state, local, or interstate body.

As we indicated during the December 13th Commission meeting, Governor Holton's efforts to "forge a solution" which reflects the interests of the Commission membership have been impressive. In this regard, we appreciate the Governor's openness to submitting a report to Secretary Dole which describes two approaches under which local control of National and Dulles could be exercised.

We concur with Secretary of Transportation Dole's premise that the Federal Aviation Administration should not be in the business of operating airports. We believe that the proposal submitted by Congressman Hoyer to transfer National Airport to an interstate authority and

Dulles International Airport to the State of Virginia is consistent with the Secretary's objectives of heightening local control over the two Washington Metropolitan Airports, as well as relinquishing federal control over the airports.

*Maryland strongly endorses the transfer of National Airport to an interstate authority and Dulles Airport to the State of Virginia. Under this approach, National would be leased to a nine member interstate authority with three members each from the District of Columbia, Virginia and Maryland, appointed by the Mayor of the District of Columbia and the two Governors. The National Airport Authority would have full policy, operating and financing authority.*

We are open to including one or two representatives of the Federal Government on the authority to recognize the Federal interest in the "Nation's Airport."

The members of the authority would serve staggered six year terms and would not hold elective or appointed political office, would reside in the Washington Metropolitan Area, and would serve without compensation. Employees of National Airport would be protected, and their pay levels, pensions and other benefits would be preserved.

Under our proposal, Dulles International Airport would be transferred to the State of Virginia. Employees of Dulles would be protected, and their pay levels, pensions and other benefits would be preserved. Virginia, of course, would have full policy and financing authority and responsibility once the transfer of Dulles has occurred.

This approach, we believe, reflects the significant interest of each of the principal jurisdictions in National Airport while allowing Virginia to develop Dulles in the same way Maryland is developing Baltimore-Washington International.

By recognizing that all jurisdictions do not have equivalent interests in Dulles, the Hoyer approach avoids the problem of fair representation which is inherent and insoluble in the single-authority proposal. As stated earlier, we understand that Virginia is troubled by the prospect of subsidizing Dulles during the initial period under a two-authority approach. However, we point out that Maryland's \$200 million investment in Baltimore-Washington International is paying significant dividends. We believe that this type of investment by Virginia and Dulles should prove equally beneficial.

Finally, we also believe that the Alternative Proposal offered by Councilman Scott Fosler of Montgomery County is a worthwhile alternative in that it endorses a single airport board for both National and Dulles airports—a concept that meets the efficiency-in-operations objectives of Secretary Dole and has the support of a majority of the Members on the Airport Commission. The Fosler proposal, takes what we believe to be an important step further by recognizing the implicit interest of each of the neighboring jurisdictions in a fair regional air transportation policy, and provides that the single board reflect an equal representation of members from Maryland, Virginia, and the District of Columbia. We believe that the Fosler proposal warrants further discussion.

Respectfully submitted,

/s/ Harry R. Hughes  
**HARRY R. HUGHES**  
Governor, State of Maryland

/s/ Steny H. Hoyer  
**STENY H. HOYER**  
Congressman,  
State of Maryland

/s/ Paul S. Sarbanes  
Senator, State of Maryland

/s/ Scott Fosler  
**SCOTT FOSLER**  
Councilman, Montgomery  
County, Maryland

*Alternative Proposal*  
Submitted by Councilman Scott Fosler

I support the Maryland proposal to transfer Washington National Airport to an interstate authority and Dulles Airport to the State of Virginia as an important step toward regional airport management. However, I also believe the benefits to the entire region would be even greater if the two airports were managed by a single authority that genuinely reflected the interests of the entire Washington metropolitan area. While the Commission has done an admirable job of moving toward our shared objective, I do not believe the majority proposal for an authority comprised of five members from Virginia, three from the District of Columbia, and two from Maryland, with one member appointed by the President, will accomplish the representation I believe essential for success.

I believe that a single, regional authority governing Washington National and Dulles Airports, with equal representation from Virginia, Maryland, and the District of Columbia (with provision for federal representation) is the simplest, fairest, and most practical way to provide effective airport management for the Washington region.

Washington National is indisputably a regional airport and should be governed with equal representation from the region's principal governments. Dulles, while currently producing neither the regional benefits nor the burdens in the magnitude of Washington National, nonetheless has substantial regional impact. The fact that the Virginia members of the Commission feel their state would decline to accept sole responsibility for Dulles without National, fearing that Dulles by itself would not be financially viable is a clear indication that the prime importance of Dulles lies not in its geographical location, but rather in its role as a regional air facility.

Viewed separately, Washington National is a more fully regional facility than Dulles. Taken together, the

two airports constitute a regional airport whose collective benefits and burdens have substantial impact on the entire Washington region, including the Maryland as well as the Virginia and District portions. However these benefits and burdens are measured—whether in population, airport patronage, economic development, or environmental impact—the current and potential effect of airport management on any of the three jurisdictions argues strongly for equal representation from each on a regional governing body.

A single regional authority with equal representation is not only fair and workable, it is also the most likely plan both to win the approval of Congress and to advance the spirit of partnership which is essential to effective regional government in the Washington metropolitan area.

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 3**

JRB:JEP:JDT:dy

H.R. 5040

[LOGO]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Aug. 6, 1986

Honorable Norman Y. Mineta

Chairman

Subcommittee on Aviation

Committee on Public Works and Transportation

House of Representatives

Washington, D.C. 20515

Dear Chairman Mineta:

At the request of the Department of Transportation we have reviewed several alternatives proposed by your staff as substitutes for H.R. 5040, the "Metropolitan Washington Airports Transfer Act of 1986," which will authorize the Secretary of Transportation to transfer Washington National and Washington Dulles International Airports to an independent Metropolitan Washington Airports Authority (Airports Authority), created by an interstate compact between Virginia and the District of Columbia. These staff proposals would provide for the creation of a board consisting of members of the House and Senate, which would have the authority to disapprove certain decisions made by the Airports Authority, including the adoption of an annual budget, the issuance of bonds, the adoption, amendment, or repeal of a regulation, the adoption of development plans and plans for land acquisition, and the appointment of the General Manager.

Two of the suggestions made by the staff would present substantial constitutional problems. The first of these proposals would create a "Federal Board of Directors," consisting of three members of the House, appointed by the Speaker, three members of the Senate, appointed by the President pro tempore, and the Comptroller General. As proposed, this Federal Board would clearly be unconstitutional. In reality the Federal Board would be no more than a committee of Congress plus the Comptroller General—who is clearly a legislative officer.<sup>1</sup> This committee would be authorized by the bill to veto certain types of actions otherwise within the Airports Authority's power under applicable state law.<sup>2</sup> In the absence of the Federal Board, the Airports Authority could implement those decisions without further review or approval. Disapproval by the Federal Board of a particular action would thus have "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *INS v. Chadha*, 462 U.S. 919, 952 (1983), and would plainly be legislative action that must conform to the requirements of Article 1, section 7 of the Constitution: passage by both Houses and approval by the President. *Id.* at 954-955. Congress cannot directly vest the Federal Board with authority to veto decisions made by the Airports Authority any more than it can authorize one House, one committee, or one officer to overturn the Attorney General's decision to allow a deportable alien to remain in the United States,<sup>3</sup> to reject rules implemented by an executive agency pur-

<sup>1</sup> See *Bowsher v. Synar*, — U.S. — (July 7, 1986), slip op. at 11-16.

<sup>2</sup> Both Virginia and the District of Columbia have enacted into law the provisions of the interstate compact, which create the Authority and vest it with powers to operate the airports. We understand that the compact was entered into pursuant to standing statutory authorization, and therefore no additional congressional approval is needed for the compact or, presumably, for any changes to the compact.

<sup>3</sup> *INS v. Chadha*, 462 U.S. at 955.

suant to delegated authority,<sup>4</sup> to dictate mandatory budget cuts to be made by the President,<sup>5</sup> or to overturn any decision made by a state agency.<sup>6</sup>

Congress could, consistent with the constitutional scheme, delegate this sort of authority to a board within the executive branch. However, since the responsibilities to be exercised by the Board are clearly operational, participation by members of Congress chosen by the leadership would violate the Incompatibility Clause<sup>7</sup> and the Appointments Clause<sup>8</sup> of the Constitution. If the Federal Board were to be established as an executive branch agency, its members would have to be appointed by the President or the head of an executive department or agency,<sup>9</sup> and members of Congress could serve, if at all, only in an advisory capacity.

<sup>4</sup> *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), aff'd 103 S.Ct. 3556 (1983).

<sup>5</sup> *Bowsher v. Synar*, slip op. at —.

<sup>6</sup> Congress has most often included legislative veto devices in statutes that delegate authority to the executive branch, and consequently litigation over legislative veto issues has involved the sharing of power within the federal government. The Court's decision in *INS v. Chadha* clearly encompasses, however, any legislative action taken by Congress—i.e., any action that affects the "legal rights, duties, and relations of persons . . . outside the Legislative Branch." 462 U.S. at 952. The clear import of *Chadha* is that when Congress legislates in a manner that affects the authority of anyone outside the legislative branch—including the states or private individuals—it cannot retain the authority to alter that legislation through less than the plenary legislative process.

<sup>7</sup> "[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

<sup>8</sup> "[The President] shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, section 2, clause 2.

<sup>9</sup> Congress could, if it chose, require Senate confirmation of such appointments.

Thus, the creation by Congress of the Federal Board and the assignment to the Board of authority to veto decisions made by the Airports Authority are clearly inconsistent with the requirements of the Constitution. The Department of Justice strongly opposes enactment of any such legislation.

A second staff draft would require Virginia and the District of Columbia to establish the Board under state law, as a condition to their acceptance of the transfer of the airports, rather than directly establish and empower the Federal Board. As we understand it, this alternative would provide that the transfer of the airport property may necessitate the enactment by Virginia and the District of Columbia of additional legislation (which would necessarily reflect a change in the underlying compact agreement) to create a new entity whose membership and powers would be identical to the proposed Federal Board.<sup>10</sup> Under this alternative the Board in theory would not exercise Congress's legislative powers, but rather powers granted to it under state law, thereby removing any federal constitutional problem.<sup>11</sup>

This alternative presents complex and novel questions involving the relationship between federal and state grants of authority. The Supreme Court has long recognized that Congress may place conditions on the transfer of funds or property to the states.<sup>12</sup> See, e.g., *Pennhurst*

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<sup>10</sup> Virginia and the District of Columbia may have existing enabling legislation that would authorize the creation of the Board under their laws without a separate enactment.

<sup>11</sup> We do not address here whether this alternative would be consistent with applicable state laws. We recommend that counsel for Virginia and the District be given an opportunity to identify any possible legal problems arising from state law.

<sup>12</sup> Congress's power to condition the transfer of federal property arises from the grant in Article IV, section 3, clause 2 of authority to Congress to "dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States."

*State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (Congress may "fix the terms on which it shall disburse federal money"); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940) ("Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy."). The Court has also long recognized, however, that Congress cannot attach unconstitutional conditions to a legislative benefit or program merely because it has authority to withhold the benefit or power entirely. For example, Congress could, if it chose, bar aliens from our shores, but could not admit them under conditions which deprive them of constitutional rights such as the right to a fair trial. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). The requirement that the Senate consent to appointments of executive officers does not, by inference, empower the Senate to exert control over the removal of officers once approved (see *Myers v. United States*, 272 U.S. 52, 126 (1926)), any more than the Senate's power to advise and consent to ratification of treaties can be used to override the requirements of the Constitution. See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957). See also, *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-621 (1871); *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 183 (1901) (Brown, J., concurring). *A fortiori*, Congress could not use its constitutional authority to place conditions on the disposition of federal property to achieve an unconstitutional result.

It is not entirely clear, however, whether creation by the states of the Federal Board would be an unconstitutional result. For example, both staff drafts currently provide, in somewhat analogous terms, that the transfer of the airports is conditioned on establishment of the Airports Authority as "a public body corporate and pol-

itic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia . . ." and on imposition by the states of certain "minimum" requirements on the powers and rights of the Authority.<sup>13</sup> If Congress were to create this Authority directly, rather than the states, we would undoubtedly view the Authority as a federal agency whose members would have to be appointed pursuant to the Appointments and Incompatibility Clauses and that would be subject to all other federal constitutional requirements. Because its powers and duties derive directly from state, rather than federal law, however, the Airports Authority is insulated from federal constitutional objection.

Based on this analogy, a colorable argument can be made that Congress could require the states, as a condition to transfer of the airports, to establish the Federal Board under state law and to vest it with the power to veto decisions made by the Authority. The Board would differ from the Airports Authority in that its members would have to be congressmen, and would be appointed by the congressional leadership rather than by the participating states and the President.<sup>14</sup> In the absence of other factors, we would not ordinarily find any federal

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<sup>13</sup> These include, for example, that the Airports Authority be "independent" of state and local governments; that it be constituted "solely to operate both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area;" that it be authorized to acquire and maintain the airport property, to issue bonds secured by revenues, to acquire other real and personal property, and to levy fees and charges; that it be subject to certain conflict-of-interest provisions; and that it be governed by a board of 11 members appointed by the Governor of Virginia, the Mayor of the District of Columbia, the Governor of Maryland, and the President from among individuals who do not hold elective or appointive political office.

<sup>14</sup> By contrast, members of the Airports Authority may not hold elective or appointive office.

constitutional objection to designation by the states of members of Congress to exercise state legislative authority. If otherwise permitted under state law,<sup>15</sup> for instance, we believe members of Congress could be appointed to state regulatory agencies or other state executive positions.

Nonetheless, given the evident purpose of the Federal Board as it would be constituted, and the context in which the creation of the Board is being considered, we have grave reservations whether the Board is constitutional. The Supreme Court made clear in *Chadha* that Congress may place limitations on the scope of the authority it delegates to the executive branch and may designate which executive officers shall exercise that authority; what Congress cannot do, however, is to delegate authority to one of its houses, committees, or officers to veto particular decisions made pursuant to that delegated authority—in effect, to retain day-to-day control over the exercise of executive authority. See *INS v. Chadha*, 462 U.S. at 955 ("Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.") *Chadha* makes clear that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, slip op. at 18.

By analogy, Congress can impose conditions on the transfer of public property that limit the manner in which that property may be used and designate which state or federal executive officers may make decisions about use of the property. The proposed condition requiring establishment of the Airports Authority and specifying its powers and duties thus presents no *Chadha*

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<sup>15</sup> As we noted above, there may be statutory or constitutional impediments that arise under state law. We do not address that question here.

problem. However, the proposed Federal Board is significantly different from the Airports Authority in that it would clearly be intended to be an agent of Congress, and to exercise direct congressional oversight authority over the Board.<sup>16</sup> Even though the Board would be created under state law and would theoretically derive its authority from state law, in form and substance it would be a creation of Congress, intended to exercise legislative authority on behalf of Congress. We believe that the courts would view this Board as an attempt by Congress to circumvent the clear requirements of Article 1, section 7, in controlling operational decisions made by the Airports Authority. The willingness of the involved states to agree to the condition, while perhaps sufficient to avoid any subsequent objections based on state sovereignty,<sup>17</sup>

<sup>16</sup> As currently proposed, we believe the Board would be considered to be an "agent of Congress," acting on Congress's behalf and at its behest. The Board would consist of members of Congress designated in their official capacity, appointed by (and therefore subject to removal by) the congressional leadership. As the Supreme Court noted recently in *Bowsher v. Synar*, slip op. at 14, the ability to remove an individual from office "dictate[s] that he will be subservient to Congress." The Board would thus clearly be answerable to Congress, rather than to Virginia or the District of Columbia, even though created under state law. Moreover, the language of the bill recites Congress's express intent to assure "adequate congressional oversight of airport operation and development in the Federal interest." Finally, we cannot ignore that the alternative requiring the states to establish the Board has been proposed precisely to avoid the clear constitutional objections raised by any direct effort by Congress to establish and empower the Board—a context that strongly suggests Congress intends the Board, however authorized, to act as its agent.

<sup>17</sup> As discussed above, the Supreme Court has repeatedly upheld, in broad terms, Congress's authority to impose conditions on the exercise of authority to spend funds and transfer property. But the question addressed in those cases has been whether, having accepted the benefit of the federal funds or property, the state had a "sovereign right to retain [the benefit] without complying with those conditions." *Bell v. New Jersey*, 461 U.S. 773, 791 (1983). To the extent those cases are relevant here they establish

would not change the fact that Congress is unwilling to give its consent to the transfer unless it is able to retain some direct control, through its agents, over use of the property. This is precisely the sort of "appealing compromise" that the Court has found inconsistent with the constitutional scheme for legislation. *INS v. Chadha*, 462 U.S. at 958; see also *Bowsher v. Synar*, slip op. at 18.

If it were not as clear that this proposed alternative is intended to give Congress, *qua* Congress, continued direct control over operation of the airports, the argument in favor of its constitutionality would be strengthened. As the Board would be established, it would be difficult to escape the conclusion that the members serve in their official legislative capacities, as representatives of Congress as a whole. However, members of Congress certainly constitute a significant user group of the two airports, and it would perhaps not be inappropriate for them to have a voice in the operational decisions in their individual capacities. For example, it might be possible for Congress to require the states to establish a board composed of representatives of user groups, such as members of Congress, to oversee decisions made by the Airports Authority.<sup>18</sup> If it were made clear that those members serve only in an individual capacity, to represent their personal interests in the operation of the airports, rather than as agents of Congress, we do not believe a *Chadha* problem would necessarily be presented. In our judgment, the best way to disassociate the Board

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only that Virginia and the District of Columbia could not accept the transfer of the airports and then refuse to comply with the condition requiring establishment of a Federal Board on the ground that the condition infringes their state sovereignty.

<sup>18</sup> A board consisting solely of, and designated by, members of Congress, with veto authority over decisions made by the Airports Authority, would be problematic in light of *Chadha*, and in this regard, we do not believe that merely designating members of Congress as "users," without placing their appointment to the Board outside of Congress, would be sufficient to overcome our objection.

from Congress would be to vest appointment and removal authority in someone other than the congressional leadership. Moreover, language should be included in the bill or its legislative history which articulates the importance of the airports to individual congressmen, because of their frequent use, and specifically stating that the congressional members of the Board shall represent only their personal interests.<sup>19</sup>

In that regard, the third draft suggested by your staff does not present the same constitutional objection as the two earlier drafts. Under this alternative, the participating states (including the District of Columbia) would be required to establish, as a condition of leasing the airports, a "Board of Review" consisting of four members of the House of Representatives and four members of the Senate. This Board would have the same authority to disapprove actions taken by the Airports Authority as would the Federal Board proposed under the other staff drafts. The members of the Board would serve in their individual capacity as users of the airport and not as representatives of Congress, and would be appointed by the Board of Directors of the Airports Authority from names submitted by the Speaker of the House and the President pro tempore. Even though as a practical matter the Speaker and the President pro tempore will be able to exercise some influence over the appointment by choosing the names on the required lists, we do not view that limitation as one of constitutional dimension. Analogously, we have not historically objected to statutes providing that the President make appointments of executive officers from lists provided by Congress, so long as the President is free to request additional names if

he does not find a list satisfactory. We assume the same flexibility will be accorded the Airports Authority.

Although the issue is not free from doubt, we believe that with the revisions made by this third draft, the proposal will withstand constitutional scrutiny. An explicit recitation in the bill that the members of Congress serve only in their individual capacity, as users of the airports, will serve as a clear indication that Congress does not intend the Board to function as an adjunct or agent of Congress *qua* Congress—*i.e.*, Congress acting in its legislative capacity. We assume that this understanding will be discussed in some detail in the legislative history of the bill. Importantly, vesting final appointment and removal authority in the Board of Directors of the Airports Authority, disassociates the Board from the direct control and supervision of the congressional leadership.

For the foregoing reasons, we would not object on constitutional grounds to enactment of the provision contained in the third staff draft. We defer to the Department of Transportation as to the merits of the proposal.

The Office of Management and Budget has advised this Department that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

/s/ John R. Bolton  
JOHN R. BOLTON  
Assistant Attorney General

<sup>19</sup> We caution, however, that if such a board were established, the congressional members would have to take care to distinguish between their respective roles as members of Congress and as member of the board. We also note that we have not reviewed whether the applicable ethics rules of the House and Senate would pose any bar to such membership.

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 7**

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**METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY  
BOARD OF DIRECTORS MEETING**

**MINUTES OF JUNE 3, 1987**

The regular meeting of the Board of Directors of the Metropolitan Washington Airports Authority was held on June 3, 1987, in the West Building at Washington National Airport. The meeting was called to order by the Chairman at 9 a.m.

**PRESENT**

Ten members of the Board were present:

Bette Anderson  
Michael Barnes  
Linwood Holton  
Ron M. Linton  
Elijah Rogers  
Polly Shackleton  
T. Eugene Smith  
Thomas P. Smith  
William Thomas  
Carrington Williams

Mr. Jack Edwards, nominated as the Presidential appointee, was also in attendance.

The first order of business was approval of the previously distributed minutes of the meeting held on May 6. Governor Holton noted that the minutes as written were not to be construed to mean that the Board would not examine the Master Plan for Washington Dulles. The minutes were approved.

Following the agenda of the meeting, (copy enclosed), under agenda item II, Committee Reports, the Chairman called for reports of the various committees.

Ms. Bette Anderson, Chairperson of the Finance Committee reported the following:

The Finance Committee has met twice since the last Board Meeting. At the May 22 meeting, the Finance Committee reviewed the four month Transition Period Financial Plan which had been prepared by the Metropolitan Washington Airports (MWA) staff. With some modifications, the Committee supported that plan. A copy of the Financial Plan, as endorsed by the Committee, was enclosed in the material which was forwarded to each Board Member for today's meeting. At the appropriate time, Ms. Anderson noted that she was prepared to move the adoption of that plan, with a Resolution which was also included in the mailing for today's meeting.

The Finance Committee met again on May 28, to consider the Authority's insurance program. This is one of the areas which the full Board had delegated to the Finance Committee. Using that delegation, the Finance Committee had also earlier authorized award of several contracts for employee health and life insurance. At the May 28 meeting, the Finance Committee reviewed various options available for other necessary insurance coverages and authorized the MWA staff to proceed to place insurance in a variety of areas, with the major items being the Airport Liability, Property, and Workers' Compensation coverages. These coverages are being placed this week and will be in effect by the planned transfer date, June 7.

The Finance Committee has not yet approved placement of coverage for Public Officials liability. The quotes received were very expensive. The Committee

is further pursuing that item with the hope of having coverage placed in the very near future.

Mr. Ron Linton, Chairman of the Operations Committee, reported that the Committee had met since the last Board Meeting and minutes from that meeting had been distributed to all Board Members. The Committee's initial focus will be on air safety matters at the two airports. The Committee and MWA staff are planning to develop a study session and Board Members will be advised when this will take place.

Mr. Carrington Williams, Chairman of the Planning Committee, reported that the Committee is endeavoring to find a date when a considerable amount of time could be spent with the professional planners, architects and engineers to discuss fully the Master Plan for Washington Dulles. The dates of July 11, 18, and 25 have been determined as being available with the various consultant firms for the Dulles session. The MWA staff will be contacting the Board Members to determine which, if any, of those dates is most convenient for the Board Members.

Turning to the information items under agenda item III, Mr. Edward Faggen reported on the status of legislation in the local jurisdictions. He noted that the D.C. Council had taken final action this past Tuesday to amend the enabling legislation and it was expected to be signed by the Mayor. On June 1, the Loudoun County Board of Supervisors adopted an Ordinance that would apply to certain County Ordinances at Dulles. On June 6, Arlington County is expected to adopt a similar amendment to their Ordinances.

Under agenda item IIIb, progress report on other transfer activities, Mr. Wilding reported that 93 percent of the MWA work force had opted to transfer with the Authority. Of the 93 percent, 83 percent were straight trans-

fers and 10 percent were those individuals who would be retiring and returning.

Governor Holton inquired about the status of the Lease. Mr. Faggen reported that Governor Baliles is expected to sign it before Saturday night. The Mayor of the District has signed it.

Mr. Wilding noted that the Lease identified a number of items which had to be accomplished before the Lease became effective. He indicated that there were a few of those items remaining and, once all were accomplished, Secretary Dole and Governor Holton would be asked to execute a certification document to that effect.

On agenda item IIIc, report on use of direct hiring authority, Mr. Wilding reported that there wasn't anything new to report since the last meeting. Overall, this authority had been used in 31 instances and since it was an interim measure pending the transfer, this would be the last report.

Mr. Linton inquired as to whether we were moving on hiring additional police and firefighters. Mr. Wilding responded by saying we were hiring ten additional firefighters effective the following Monday and that a lot of work was being done in these areas.

On agenda item IIId, current concession and construction activities, Mr. Wilding noted that Mr. Thomas Smith had suggested at the May Board Meeting that a list of concession type solicitations be developed. This has been done and was in the folder before them. It will continue to be updated on a regular basis. Mr. Wilding also noted that the airport traffic statistics for April were in the folder before them.

Governor Holton then introduced Mr. Najeeb Halaby, President of DartRAIL who presented a briefing on DartRAIL, a proposed 16.7 mile light rail system beginning at the West Falls Church Metro station and ending at Washington Dulles International Airport's main terminal.

DartRAIL, as proposed, would be constructed on the median strip dividing the Dulles Access Road. Mr. Halaby encouraged the Board to give their support to the transportation system.

Governor Holton told the DartRAIL representatives that he admired the innovative initiatives that DartRAIL had produced, noting that there were still a lot of unanswered questions.

Mr. Thomas suggested that the Planning Committee consider what the Authority should be doing now to pursue some type of rapid rail to Dulles (not necessarily DartRAIL).

Mr. Wilding noted that this raises some serious priority questions because there are so many issues to which the Authority needs to be devoting their energies and resources.

Governor Holton said the Planning Committee should take a preliminary look at rail systems and present a recommendation to the Board, taking into account Mr. Wilding's viewpoint.

Mr. Faggen reported on agenda item IVa, adoption of two additional regulations, (1) landing fee rule and (2) weapons rule. Mr. Faggen reported that the FAA had now completed the modification of these two regulations, as had been forecast at the time the Board adopted the other regulations.

Mr. Williams moved the adoption of the following Resolution and it was unanimously passed:

**RESOLVED**, That the regulations of the Federal Aviation Administration, Metropolitan Washington Airports in Federal Aviation Regulations, Sections 159.79, 159.181, 159.183, 159.184, and 159.185 as they are effective on June 6, 1987, are hereby adopted by the Metropolitan Washington Airports Authority with the force and effect of law as of the effective

date of the transfer of the Airports to the Metropolitan Washington Airports Authority.

Further, until the Airports regulations are recodified, they shall be cited as the Metropolitan Washington Airports Regulations §§ 159.1 et seq.

Under agenda item Va., delegations of authority, Mr. Linton noted that the Operations Committee was working with the MWA staff on non-financial items and would examine policies to see whether there were any recommendations that needed to be brought before the full Board. It was noted that the General Manager needed the necessary "tools" to carry out the operations of the airports.

Mr. Thomas suggested and it was agreed that under item d., in the delegations package, which had been previously distributed to the Board Members, that the language be changed to delete the phrase "easements and rights of way."

On page 2 under item b., of this package, Mr. Rogers suggested and it was agreed that the dollar amounts be cut in half and the General Manager could approve these sums. Anything in between the lower amount and the figures as previously shown would need approval of the Finance Committee. Anything above the figures previously shown would need to have the full Board's approval.

Mr. Rogers moved the adoption of the following Resolution and it was unanimously passed:

**RESOLVED**, That the General Manager of the Metropolitan Washington Airports Authority is hereby delegated the authority of the Board, subject to the limitations expressed herein:

a) to manage the operation of Washington National and Washington Dulles International Airports, including hiring, administering and organizing the

staff to maintain, improve, operate, protect, and promote the airports,

- b) to acquire, by purchase, lease or otherwise, goods, services, and property, consistent with an approved financial plan or budget,
- c) to provide for the use of airport property by airlines and other commercial enterprises, non-commercial and governmental entities for aviation business or activities, or activities necessary or appropriate to serve passengers or cargo in air commerce, including concession agreements, or for non-profit public use facilities,
- d) to grant licenses and permits pertaining to the use of airport property,
- e) to enter into, administer, modify and terminate contracts and agreements legally binding upon the Authority for the purposes set out in paragraphs a through d,
- f) to expend Authority funds for the purposes set out in a through d,
- g) to redelegate and authorize further redelegation and cancel any such redelegation as he considers appropriate,
- h) to issue directives to implement the above.

*Limitations:*

- a) All authority delegated herein shall be exercised in accordance with the laws, regulations and bylaws applicable to the Authority and applicable resolutions of the Board of Directors.
- b) The acquisition of goods, services, and property shall be accomplished in accordance with the permanent procedures and limitations to be adopted by the Board which will include a program for obtain-

ing contracts with minority and women owned businesses.

1. Pending the adoption of this permanent procedure, Board approval is required: i) before the solicitation and before the award of any contract to acquire goods, services, and property at a cost to the Authority of \$200,000 or more, or any concession contract which is anticipated to generate annual revenue to the Authority of \$100,000 or more, ii) before solicitation for a contractor to perform construction for the Authority that will cost the Authority \$1,000,000 or more, and iii) before approval of tenant construction that will cost the tenant \$1,000,000.
2. Pending the adoption of permanent procedures on matters for which Board approval is not required, approval of the Finance Committee of the Board is required: i) before the solicitation and before the award of any contract to acquire goods, services and property at a cost to the Authority of \$100,000 or more, or any concession contract which is anticipated to generate annual revenue to the Authority of \$50,000 or more, ii) before solicitation for a contractor to perform construction for the Authority that will cost the Authority \$500,000 or more, and iii) before approval of tenant construction that will cost the tenant \$500,000 or more.
- c) The delegation does not include authority for the acquisition or sale of real property or the grant of easements.
- d) Notwithstanding these delegations, the Board may expressly reserve any specific management or contracting matters and decisions to itself or to a duly constituted committee.
- e) The General Manager shall present the Board with a plan for staffing the airports. All selections

for positions reporting directly to the General Manager shall be subject to approval by the Board.

Under agenda item Vb., adoption of Transition Period Financial Plan, Ms. Anderson moved the adoption of the proposed Resolution with a change suggested by Mr. Thomas. The following Resolution was unanimously passed:

**RESOLVED**, That the Transition Period Financial Plan is hereby adopted, the General Manager is authorized to incur and liquidate direct expenses for the transition period of June 7, 1987, through September 30, 1987, in a total amount not to exceed \$21,484,000 for the care, operation, maintenance, construction, improvement, and protection of Washington National and Washington Dulles International Airports, and the General Manager is authorized to adjust or modify the financial plan in a manner generally consistent with the Plan and within the level approved herein.

Turning to agenda item Vc., appointment of Board of Review, Governor Holton said that letters had been received from the Speakers of the United States House of Representatives, Thomas O'Neill and from Jim Wright, (copies enclosed) recommending the following for the Board of Review:

Honorable Silvio O. Conte, Committee on Appropriations

Honorable William Lehman, Committee on Appropriations

Honorable Lawrence Coughlin, Committee on Appropriations

Honorable John Paul Hammerschmidt, Committee on Public Works and Transportation

Honorable Norman Y. Mineta, Committee on Public Works and Transportation

Honorable Newt Gingrich, Committee on Public Works and Transportation

Honorable Dan Rostenkowski, House of Representatives

Governor Holton recommended the adoption of the following Resolution which was unanimously passed:

**RESOLVED**, That in accordance with Article IV of the Bylaws of the Metropolitan Washington Airports Authority, each of the following named individuals having been properly recommended by the Speaker of the United States House of Representatives, the Board of Directors hereby appoints

from the Committee on Appropriations, the Honorable Silvio O. Conte and the Honorable William Lehman,

from the Committee on Public Works and Transportation, the Honorable John Paul Hammerschmidt and the Honorable Norman Y. Mineta,

from the House of Representatives, the Honorable Dan Rostenkowski, to serve on the Board of Review of the Airports Authority as representatives of the users of the Metropolitan Washington Airports.

Further, these appointments shall be effective on the effective date of the Lease between the Airports Authority and the United States for the Lease of the Metropolitan Washington Airports. The terms of each of these appointments was determined by a drawing, and is as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term:

The Honorable Silvio O. Conte	2 years
The Honorable William Lehman	4 years
The Honorable John Paul Hammerschmidt	6 years
The Honorable Norman Y. Mineta	6 years
The Honorable Dan Rostenkowski	2 years

As yet, no names have been received from the Senate.

Under agenda item Vd., adoption of existing labor agreements, Mr. Linton pointed out that a section in the Lease required that the Board continue certain activities, namely, to adopt all labor agreements which are in effect on the effective date of the Lease and to provide for certain rights for employees of the FAA, MWA, who transfer to the Authority and who are terminated by the Authority during the first five years. He made a motion to adopt both Resolutions as previously distributed to the Board. This was unanimously passed. Mr. Thomas asked that the minutes reflect that this action was being taken only because it was required by the Federal legislation and reflected in the Lease.

At 10:20 am., the meeting was adjourned and the Board went into executive session to discuss personnel matters.

3 Enclosures

Submitted by /s/ June G. Anderson  
 JUNE G. ANDERSON  
 Secretary (Acting)

**U.S. District Court for the District of Columbia**  
**Plaintiffs' Exhibit 9**

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**RESOLUTION NO. 87-12**

**METROPOLITAN WASHINGTON  
 AIRPORTS AUTHORITY  
 RESOLUTION**

**RESOLVED**, That in accordance with Article IV of the Bylaws of the Metropolitan Washington Airports Authority, each of the following named individuals having been properly recommended by the Speaker of the United States House of Representatives, the Board of Directors hereby appoints

from the Committee on Appropriations, the Honorable Silvio O. Conte and the Honorable William Lehman,

from the Committee on Public Works and Transportation, the Honorable John Paul Hammerschmidt and the Honorable Norman Y. Mineta,

from the House of Representatives, the Honorable Dan Rostenkowski, to serve on the Board of Review of the Airports Authority as representatives of the users of the Metropolitan Washington Airports.

**FURTHER**, these appointments shall be effective on the effective date of the lease between the Airports Authority and the United States for the lease of the Metropolitan Washington Airports. The terms of each of these appointments is as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term:

The Honorable Silvio O. Conte	2 years
The Honorable William Lehman	4 years
The Honorable John Paul Hammerschmidt	6 years
The Honorable Norman Y. Mineta	6 years
The Honorable Dan Rostenkowski	2 years

/s/ June G. Anderson  
**JUNE G. ANDERSON**  
 Acting Secretary

(Adopted at MWAA Board Meeting, June 3, 1987)

**U.S. District Court for the District of Columbia**  
**Plaintiffs' Exhibit 20**

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**METROPOLITAN WASHINGTON  
 AIRPORTS AUTHORITY  
 BOARD OF REVIEW**

Washington National Airport  
 Washington, D.C. 20001

**MINUTES OF AUGUST 6, 1987**

The first meeting of the Board of Review of the Metropolitan Washington Airports Authority, convened at the call of the Authority, was held Thursday, August 6, at 8:45 a.m. in Room 2167 of the Rayburn House Office Building. Four members were present. As the Senate members had not yet been appointed, a quorum was present.

*Members Present:*

John Paul Hammerschmidt  
 William Lehman  
 Norman Y. Mineta  
 Dan Rostenkowski

*Absent:*

Silvio O. Conte

*Authority Officers Present:*

James A. Wilding, General Manager  
 Walter B. Hobart, Jr., Manager,  
 Administrative Systems  
 Gregory Wolf, Secretary and Counsellor to the  
 Board of Directors

*Matters Pending Review*

1. Appointment of James A. Wilding as General Manager and Chief Executive Officer of the Authority. Action taken by the Board of Directors at its regular meeting May 6, 1987; transmitted to the Board of Review by Linwood Holton, Chairman, Board of Directors, June 8, 1987.
2. Adoption of an Annual Budget for Fiscal year 1988 (October 1, 1987-September 30, 1988). Action taken by the Board of Directors at a special meeting July 22, 1987; transmitted to the Board of Review by Linwood Holton, July 23, 1987.

The Secretary, Mr. Wolfe, called the meeting to order and requested nominations for Chairman. Mr. Hammer-schmidt nominated Mr. Mineta; Mr. Rostenkowski seconded. Nominations were then closed on the motion of Mr. Lehman, and Mr. Mineta was unanimously elected by a voice vote. He immediately assumed the chair.

The Board proceeded to consider the Fiscal year 1988 Annual Budget. Mr. Wilding provided a general briefing, and he and Mr. Hobart responded to questions. The Board then unanimously approved the Director's adoption of the annual budget, thus terminating the 30-day review period.

The Board thereupon went into executive session to consider the appointment of James A. Wilding as General Manager and Chief Executive Officer of the Authority. When the regular session resumed, the Chairman announced that the Board had unanimously approved the Directors' appointment of Mr. Wilding.

The Chairman announced that he would defer discussion both on the establishment of the position of Vice Chairman and on the employment of staff to the Board of Review until the rest of the Board had been appointed. He also requested that the Authority provide informa-

tion about its organization to the Board of Review members, and that briefings and tours of the facilities be arranged. Mr. Wilding advised that the Board of Directors had on August 5 approved amendment to the Authority's taxicab regulations, and that they would be forwarded soon to the Board of Review.

There being no further business, the meeting was adjourned at 9:45 a.m.

Respectfully submitted:

/s/ Gregory Wolfe  
GREGORY WOLFE  
Secretary

approved  
February 24, 1988  
GW

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 8**

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**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY**

Washington National Airport  
Washington, D.C. 20001

**BOARD OF DIRECTORS MEETING**

**MINUTES OF SEPTEMBER 2, 1987**

The regular monthly meeting of the Metropolitan Washington Airports Authority Board of Directors was held in the West Building at Washington National Airport on September 2, 1987 and called to order by the Chairman at 9:00 a.m. The following nine members of the Board and the as yet unconfirmed Presidential nominee were present:

- Bette B. Anderson
- Michael D. Barnes
- Linwood Holton, Chairman
- Ron M. Linton
- Elijah Rogers, Vice Chairman
- T. Eugene Smith
- Thomas P. Smith
- William Thomas
- Carrington Williams
- Jack Edwards (Presidential nominee)

The Secretary and the following Authority officers were also present:

- James A. Wilding, General Manager
- Hugh Riddle, Jr., Deputy General Manager
- Edward S. Faggen, Legal Counsel

The first order of business was approval of the previously distributed minutes of the last regular monthly meeting, held August 5, 1987. The minutes were unanimously approved.

In accordance with the Authority's bylaws, the Chairman called for nominations for Chairman and Vice Chairman. A motion made by Eugene Smith that the present Chairman and Vice Chairman be reelected for another one-year term was adopted unanimously.

The Chairman then called for reports of the Finance, Operations and Planning Committees.

Finance Committee Chairman Bette Anderson reported that, although several Committee members were unable to attend, the Committee had met August 19, 1987, and had discussed with the staff a number of issues the Committee planned to act on at its September meeting. They included: obtaining directors' and officers' liability insurance, which is not included in the original insurance coverages for the Authority; selecting a second fixed base operator at Dulles; and continuing the Price Waterhouse contract for support services to the Authority during the transition period.

The Finance Committee also reported on the need to expedite contract solicitations for bond counsel, feasibility consultant, outside auditor, and program manager. Ms. Anderson stated that she was prepared to move the adoption of a resolution delegating authority to the Finance Committee to approve these solicitations at the appropriate time.

Replacement of one of the fire engines demolished in an accident on August 4, 1987, had also been discussed at the Finance Committee meeting. Two alternative Resolutions for replacing this vehicle would be offered.

Ron Linton, Operations Committee Chairman, reported that the Committee had not met because a quorum could

not be assembled. The Committee would meet on September 17, 1987, and a report would be ready for the next Board meeting.

Planning Committee Chairman Carrington Williams reported that the Committee held a lengthy meeting on August 28, 1987, chiefly to address the status of master planning at National. Several Dulles issues had also been discussed, including the decision to proceed with moving sidewalks in the midfield terminal design and close-in parking access alternatives, including decked parking, without impacting the aesthetics of the Saarinen terminal. Further exploration by the architects would be requested in order to achieve an acceptable compromise. Mr. Williams stated that this would be an issue the Authority must confront, and noted that there are strong Board member opinions on both sides.

Mr. Williams also reported that Howard, Needles, Tammen & Bergendoff (HNTB) had provided the Planning Committee with an update on the Master Plan for Washington National. The consensus of the Committee was that the reported status of the new terminal road network and configuration of airline gates was "as good a compromise as could be worked out." At the request of Board Members, HNTB had developed a preliminary design concept that would connect the Metro station and parking structure with an enclosed bridge structure instead of a tunnel, as previously proposed. Further presentations would be made to the full Board as the Plan develops. Mr. Williams then called on Mr. Wilding for additional comments.

Mr. Wilding reported that Skidmore, Owings & Merrill (SOM) had resumed work on a Dulles midfield terminal design. He noted that moving sidewalks in the midfield terminal will be a "bit expensive." SOM had already been instructed to include them in the design.

Governor Holton commented that he was pleased with the decision to include moving sidewalks in the midfield ter-

minal design. He also expressed satisfaction with the layout of the new terminal building at Washington National, noting that it is centered on the subway platform, with escalators at the north and south ends of the Metro station and parking behind the elevated Metro structure. He said this is exactly what is needed.

Mr. Williams noted that the terminal, as planned, would be about 250 feet closer to the Metro station than the current North Terminal.

Mr. Linton also endorsed the bridge proposal. He took exception to the *Washington Post* account of the last regular Board meeting, objecting to the report that the Dulles Master Plan had been approved with minor changes. He asked that these minutes clarify it had not been his understanding or intention to approve and accept the Plan as it now stands.

Mr. Holton responded that the minutes of that meeting report the Master Plan had been approved and that only access and parking had not been fully accepted.

Mr. Eugene Smith observed that the limited development options available at National would lead more easily to unanimity there than at Dulles.

Mr. Wilding reported that as of Monday night, August 31, 1987, the Authority had \$3.9 million on deposit. Since the transfer on June 7, 1987, income had been roughly \$16 million and expenditures about \$12 million.

Mr. Wilding also mentioned that construction was under way at Dulles on the extension of one of the interim midfield terminals, built by Presidential and now occupied by Continental. Under an agreement with Continental, American Airlines had funded and occupied four gates of the expansion. As of noon that day, American Airlines' flights were to be in service from its portion of the interim midfield terminal. By the middle of the following week, Continental's portion of the expansion

would be operational. Construction of the ramp portion of United's nine-gate extension of its interim midfield terminal had begun the previous week and was scheduled for completion next Spring. Trans World Airlines will fund and occupy four gates at that facility.

Mr. Wilding also reported United would establish new, non-stop service from Dulles to Nassau at the end of October, a significant improvement to the Dulles service pattern.

Mr. Riddle summarized the traffic statistics already provided to the Board Members, noting that Washington National's passenger traffic was up 11.2 percent for the month of July and 7.3 percent for the preceding 12 months. The growth trend has been continuing from last year after a number of years of unsteadiness. The passenger count was at 15.3 million for the year and was likely to eclipse the previous high in 1979. Washington Dulles's passenger count was up 14.7 percent for the month of July and 56.3 percent for the preceding 12 months. It was at 11.3 million for the 12-month period. Air carrier operations for the month of July at Dulles were a little over 17 thousand, compared to 16 thousand at National. Mr. Riddle noted that National, however, slightly exceeds Dulles in total operations.

Mr. Riddle then reported on the proposal to establish a Terminal Control Area (TCA) at Dulles. The Federal Aviation Administration had announced its intention to establish a TCA at Dulles and another at Baltimore/Washington International Airport. Washington National already had a TCA. Seven other new airports, also announced as candidates for TCAs, would be added to the 23 airports that currently have them. Mr. Riddle added that all airplanes operating in a TCA must have electronic gear that reports the plane's altitude and position to air traffic controllers, and must be subject to positive control. He also commented that the proposed establishment of a TCA at Dulles reflected growth at that air-

port. Mr. Riddle advised that we would be likely to see some controversy about the new TCAs in the coming months as the Notice of Proposed Rulemaking works its way through the federal government.

In the absence of questions, comments or unfinished business, the Chairman turned to new business.

Governor Holton reported that a letter from the President *pro tempore* of the Senate nominating Senate members to the Board of Review had been delivered to his office after close of business August 4, 1987, but that he had not learned of it until some time after the last Board meeting on August 5. Only four names had been submitted. He reported that the Board of Review, operating with the previously appointed House members only, had met with MWAA staff and approved the appointment of Mr. Wilding as General Manager and the Authority's FY 1988 budget.

After discussing the alternatives open to the Board, including requesting additional Senate nominees, and rejecting one or more of the nominees, a motion made by Mr. Linton that the Resolution appointing the four Senate members to the Board of Review be adopted was unanimously accepted. The Resolution is as follows:

RESOLVED, That in accordance with Article IV of the bylaws of the Metropolitan Washington Airports Authority, each of the following named individuals having been properly recommended by the President *pro tempore* of the United States Senate, the Board of Directors hereby appoints:

from the Committee on Appropriations, the Honorable Robert C. Byrd and the Honorable Ted Stevens; from the Committee on Commerce, Science, and Transportation, the Honorable Ernest F. Hollings and the Honorable Nancy L. Kassebaum;

FURTHER, that these appointments and the appointments previously made in Resolution 87-12 shall

be effective as of June 3, 1987. The terms of each of these appointments are as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of this term:

The Honorable Robert C. Byrd	2 year term
The Honorable Nancy L. Kassebaum	4 year term
The Honorable Ted Stevens	6 year term
The Honorable Ernest F. Hollings	6 year term

The term of each was determined by a drawing conducted by Governor Holton immediately after adoption of the resolution.

Mr. Wilding noted that two alternative Resolutions concerning replacement of the fire truck had been mailed with the agenda. He proposed adoption of the second, authorizing the General Manager to approve the purchase of a new truck. He anticipated a decision could be reached at the end of the week.

Mr. Eugene Smith moved the adoption of the following Resolution, which the Board agreed to unanimously:

RESOLVED, that the Board delegates authority to the General Manager to purchase an aerial ladder truck to replace the Authority firefighting vehicle demolished on August 4, 1987.

Ms. Anderson moved the following Resolution delegating authority to the Finance Committee, which the Board agreed to unanimously:

RESOLVED, that the Board of Directors delegates to the Finance Committee the authority to approve the issuance of solicitations for Bond Counsel, Feasibility Consultant, Outside Auditor, and Program Manager.

Governor Holton then requested that the Board go into executive session to discuss informational items. He noted that because the Board would not be taking any

formal action in executive session, there would be no further public session.

There being no further business, the meeting adjourned at 9:26 a.m.

Respectfully submitted:

/s/ Gregory Wolfe  
**GREGORY WOLFE**  
 Secretary and Counsellor  
 to Board of Directors

**U.S. District Court for the District of Columbia**  
**Plaintiffs' Exhibit 10**

**RESOLUTION NO. 87-27**

**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY**

**RESOLUTION**

**RESOLVED**, That in accordance with Article IV of the bylaws of the Metropolitan Washington Airports Authority, each of the following named individuals having been properly recommended by the President *pro tempore* of the United States Senate, the Board of Directors hereby appoints:

from the Committee on Appropriations, the Honorable Robert C. Byrd and the Honorable Ted Stevens; from the Committee on Commerce, Science, and Transportation, the Honorable Ernest F. Hollings and the Honorable Nancy L. Kassebaum;

**FURTHER**, that these appointments and the appointments previously made in Resolution 87-12 shall be effective as of June 3, 1987. The terms of each of these appointments are as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term:

The Honorable Robert C. Byrd	2 year term
The Honorable Nancy L. Kassebaum	4 year term
The Honorable Ted Stevens	6 year term
The Honorable Ernest F. Hollings	6 year term

/s/ **Gregory Wolfe**  
**GREGORY WOLFE**  
Secretary

(Adopted at MWAA Board of Directors Meeting, September 2, 1987)

**U.S. District Court for the District of Columbia**  
**Plaintiffs' Exhibit 19**

**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY  
BOARD OF REVIEW**

Washington National Airport  
Washington, D.C. 20001

**MINUTES OF FEBRUARY 24, 1988**

The second meeting of the Board of Review of the Metropolitan Washington Airports Authority, convened at the call of its Chairman, was held Wednesday, February 24 at 8:45 a.m. in Room S-146 of the Capitol.

*Members Present:*

Norman Y. Mineta, Chairman  
William Lehman

*Authority Representatives Present:*

James A. Wilding, General Manager  
Edward S. Faggen, Legal Counsel  
Francis J. Conlon, Chief Engineer  
Nancy Bruce, Governmental Affairs

Gregory Wolfe, Secretary and Counsellor to the Board of Directors

Franklin D. Raines, Lazard Freres & Co., Financial Advisor to the Authority

*Action Pending Review*

Review of the Board of Directors authorization for the issuance of bonds for the "Early Development Program" projects at both Washington National and

Washington Dulles International Airports. Action taken by the Board of Directors at its regular meeting February 3, 1988; transmitted to the Board of Review by the Secretary on February 3, 1988.

The Chairman, Mr. Mineta, called the meeting to order at 9:05 a.m.

#### I. APPROVAL OF MINUTES

The first order of business was approval of the previously distributed minutes of the last meeting, held August 6, 1987. The minutes were unanimously approved.

#### II. REPORT ON "EARLY PROGRAM" PROJECTS

Mr. Wilding reported on the authorization for the issuance of bonds, describing the purpose of this early financing and the projects it would fund. He explained that the financing was intended to enable construction to begin this spring on the first part of the development program at both Airports. Part of the proceeds would be used for the approximately \$30 million payment the Authority owes the federal government to cover its pension liability.

The Master Plan for National would be moving through the final stages of approval during the week of March 1, 1988. Consideration by the Planning Committee of the Board of Directors would be required before the Committee could recommend approval to the full Board on March 16 for approval. The Plan would then be submitted to the Board of Review, which would have 30 days to disapprove it. Submission should occur on March 16.

Mr. Lehman asked why money was being spent for rehabilitation in advance of a master plan, and if the work would be consistent with the Master Plan. Mr. Wilding replied that the rehabilitation projects are entirely consistent and are necessary repair and maintenance projects.

Mr. Mineta asked if maintenance was being neglected until financing was approved. He noted that either the maintenance program was inadequate, or maintenance was being deliberately delayed. He cited the defective lighting system in the Dulles main parking lot as an example.

Mr. Wilding responded that he recognized certain deplorable conditions existed, and they were being addressed, but it would take four or five years to work through a backlog of projects that had not been funded while the Airports were federally operated.

Mr. Wilding then turned to the fourteen projects listed in National's "Early Program", showing their location on a large aerial photograph. The first and largest project would be a parking garage, which would provide a net increase of 1,200 spaces.

Mr. Lehman inquired about the distance from the new garage to the Main Terminal, and whether there would be a skybridge. Mr. Wilding replied the distance would be 1200 feet, and the connection would be a tunnel with moving sidewalks.

Mr. Wilding then described the second major project at National: the demolition of Hangar 1 (the hangar closest to the Main Terminal) and construction on its site of a two-level parking structure to be used by waiting taxicabs. This project would result in the elimination of the lines of cabs along the roadway system.

The third major project would be a portion of the new roadway system, heading south along the property line parallel to the George Washington Parkway.

In response to Mr. Mineta, Mr. Wilding reported that work on the Early Program projects would begin soon, and the road project and cab facility would be complete in the summer of 1989. The parking garage would open late 1989.

Mr. Mineta asked about the number of parking spaces at National. There were about 4,700; the plan was to increase the total to about 8,000. Mr. Wilding also mentioned that the construction of the garages would eliminate existing spaces, so additional satellite parking would be provided at the south end of the Airport before construction begins.

Mr. Lehman asked about the parking lots along the Smith Boulevard exit roadway. Mr. Wilding responded that those public parking lots (Lot No. 1 and Short-Term Lot B) would be closed when construction of the new terminal begins. The Congressional lot would remain in its current location during the Early Program construction period.

Mr. Mineta asked generally about changes from earlier plans, and the relationship between the Metro station and the new terminal. Mr. Wilding explained that the plans had not changed much, but further consideration had resulted in locating the new terminal building closer to the Metro.

Mr. Mineta asked how the two levels of the new road system would be used, and Mr. Wilding explained that the top would be for departing passengers and the bottom would be for arriving passengers and taxis.

Mr. Lehman noted that northbound traffic from the Airport presented a serious traffic problem, and asked what would be done about the situation and how soon. Mr. Wilding said he expected a fourth lane to be added to the George Washington Parkway between the Airport and the 14th Street Bridge. The staff had been working with the Park Service, which would have to agree to any such changes.

Mr. Mineta asked if any of the Early Program projects would be undone as the development plan progresses.

Mr. Wilding responded that all the Early Program projects were included in the full development program.

Mr. Lehman asked how often shuttle buses would operate. Mr. Wilding explained that there would be at least enough buses to maintain the frequencies being operated now, one trip every three or four minutes.

Mr. Mineta asked what the Early Program would cost at National. Mr. Wilding estimated \$50 million, noting that it might reach \$60 million.

Mr. Mineta asked how many levels there would be in the new parking garage; the response was 3½ level floors. Mr. Mineta asked if flat floors with ramps were more expensive. Mr. Conlon said that while he did not know the precise difference in costs, the plan is to tie in the structure architecturally with the Metro station and the Main Terminal, and the decision had been made to use 3½ floors. He thought the cost differential was not significant.

On a chart of the Airport, Mr. Wilding showed an Early Program project to pave an area near the runways for parking aircraft that was critical to the construction of the terminal building. Mr. Mineta asked if it would meet 1,000-foot distance requirement from an active runway. Mr. Wilding responded that aircraft had to be parked 750 feet from the runway and assured that all safety criteria would be met.

Mr. Mineta asked if the airlines were already obliged to pay for the improvements under the contract with the Authority. Mr. Wilding explained that the Authority could cancel the current airline agreements at any time, but they would expire next calendar year. Negotiations would begin later this year with the carriers to reach new long-term agreements.

Generally, the carriers had been agreeable and very supportive of the overall development program, and the

"Early Program" had been discussed frequently with the air carrier committee created to monitor the development program at National.

Mr. Mineta asked about the revenues required to cover the bonds, and how the Authority knew that the income would be adequate. Mr. Raines noted that the Authority could finance the entire Early Program without airline agreement. The bonds would be supported by the market, the demand for airline service to and from Washington. Both National and Dulles were heavily origin and destination ("o & d") airports, which meant great strength financially.

Mr. Wilding noted that the activity level at National was stable now at about 16 million passengers, with a 1½ percent increase per year. The Authority expected growth to stop at about 19 million 15 years from now.

Five years ago, there had been 2.5 million passengers at Dulles; it currently had 11 million, and the total was expected to increase to 20 million by 2005.

Mr. Lehman asked if there was an alternative to building flanking garages at Dulles, and suggested underground garages. Mr. Wilding answered that while the option did exist, underground construction would be very expensive, as well as difficult, since it would be necessary to go through shale rock. He advised that the current proposal was to depress the ground level four feet and add one deck.

Mr. Mineta asked why it was necessary to depress one level, and why two decks could not be built. Mr. Wilding answered there was a strong sense that adding even one deck could interfere with the view of the Saarinen Main Terminal.

Mr. Wilding then described the Early Program projects at Dulles, showing their location on an aerial photograph. The construction of a new international arrivals facility

to accommodate 2,400 arriving passengers hourly would cost about \$44 million. The existing facility now normally handled 700 international passengers hourly.

A design contract for extension of the Dulles Terminal, and a contract for the removal of the Main Terminal ceiling, possibly the largest asbestos ceiling in North America, were also included. While it would be some time before the ceiling would be removed, it was being monitored very closely and was not leaking.

In addition, the Early Program included expansion of the domestic baggage claim facilities and upgrading of the automated flight information system. Two runway high-speed turn-back fillets would be expanded, and Taxiway W-2 would be extended. Two roadway improvements would be undertaken, and nine hundred acres would be acquired to build a third north-south parallel runway.

Mr. Lehman asked about depressed parking and what effect it would have on temporary and long-range parking plans and shuttle bus systems. Mr. Wilding responded that there would be 12,000 public parking spaces daily. The Authority believes that a mix of more close-in parking and satellite parking with shuttle system can meet the parking needs. There would ultimately be 20,000 parking spaces. The new parking plans would not conflict with present roadways.

Mr. Mineta asked to what extent had surrounding jurisdictions prevented residential encroachment at Dulles. Mr. Wilding responded that Loudoun and Fairfax Counties had been cooperative, and the new parallel runway was shown on the Loudoun land use plan.

The discussion now turned to the financing program. Mr. Raines explained that it was desirable to move ahead with the development program to take advantage of the construction season. Prospects for the sale of bonds were good; the Authority had received proposals from banks

offering letters of credit and bond insurance companies offering to guarantee the bonds.

Mr. Lehman asked if there was a rating on the bonds. Mr. Raines said that a rating would not be obtained until the feasibility analysis necessary to support the Authority's own credit had been established. In the meantime, the Authority's bonds would be supported by the AAA rating of the bond insurer and letter of credit banks.

Mr. Mineta next asked how the underwriters had been chosen. Mr. Raines explained that underwriting firms had submitted proposals addressing, among other matters, the qualifications and experience of the firm and the individuals who would be working on the Authority issues, the firm's understanding of the Authority's needs, the firm's airport experience, and experience in the Washington region.

Staff had reviewed the responses, and had ranked the firms by the criteria established in the Request for Proposals. The Board of Directors, in turn, had developed a short list of prospective firms. All firms on the short list had been interviewed, making both oral and written presentations to enable the Board to make a selection.

Mr. Mineta asked if the selection criteria were public. Mr. Raines responded that Mr. Mineta would be provided with a matrix for his review.

Mr. Mineta asked if there had been any affirmative action requirements in the criteria. Mr. Raines responded that three minority, seven regional, and four national firms had been selected. There would probably be over 200 firms in the marketing group selling bonds for the Authority.

Mr. Mineta questioned how the final cuts had been made. Mr. Raines replied that the staff had done a quality ranking, and the Finance Committee had reviewed this ranking and had interviewed the firms with the staff and financial advisors.

The Chairman then called for action on the business of the day.

### III. ACTION ON MWAA RESOLUTION NO. 88-3 AUTHORIZING THE ISSUANCE OF BONDS FOR "EARLY PROGRAM" PROJECTS

The Secretary explained that the proposed Resolution was framed in the negative because the Board of Review could only disapprove. Mr. Lehman then moved the adoption of the following Resolution:

**RESOLVED**, That Resolution 88-3 of the Board of Directors, authorizing the issuance of bonds in an amount not to exceed \$281 million to fund initial construction at Washington National and Washington Dulles International Airports, is hereby disapproved.

The Resolution was unanimously disapproved.

### IV. OTHER BUSINESS AND ADJOURNMENT

Steven Palmer, representing Senator Hollings, inquired about a Bill, S. 2004, introduced by Senator Sarbanes and supported by the Federal Firefighters Union. Mr. Faggen explained the Authority's differences with the firefighters and opposition to the legislation.

Mr. Mineta commented that he was pleased the improvements had begun, and suggested a meeting late in March. The Master Plan should be forwarded to the Board of Review on March 16 and the Board of Review would have 30 days to act, until April 15. The Authority agreed to schedule individual briefings on the Master Plan for the Members of the Board of Review.

The meeting formally adjourned at 10:35 a.m.

Respectfully submitted:

/s/ Gregory Wolfe  
GREGORY WOLFE  
Secretary  
Approved  
4/13/88  
lm

**U.S. District Court for the District of Columbia  
Defendants' Exhibit 7**

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**RESOLUTION NO. 88-8**

**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY**

**RESOLUTION**

WHEREAS, The Metropolitan Washington Airports Authority is charged in the interstate compact legislation creating it and in its lease with the federal government promptly to commence improvement of both of the Metropolitan Washington Airports, Washington National and Washington Dulles International;

WHEREAS, There has never been an approved Master Plan for Washington National Airport;

WHEREAS, The current Master Planning process began in 1982, before the Authority assumed control of the Airports;

WHEREAS, The proposed Master Plan has been developed in consultation with local governments, federal agencies, user groups, and a regional advisory committee, and has been adequately reviewed by them;

WHEREAS, The proposed Master Plan has been presented to citizens groups, government bodies, and the general public by the Authority staff and its consultants;

WHEREAS, The Board of Directors is satisfied that the proposed Master Plan includes facilities necessary and appropriate to serve the projected numbers of passengers at National Airport, and that it will not bring about an increase in air traffic there;

WHEREAS, The Board of Directors is satisfied that the proposed Master Plan will not affect the noise ex-

posure on National's neighbors, and that noise abatement planning will continue in the Authority's ongoing noise ("Part 150") study;

WHEREAS, The Board of Directors is satisfied that the Federal Aviation Administration and the air carriers are responsible for determining and will adequately address all questions of the safety of operation of any type of air carrier aircraft before operating it at National Airport; now, therefore, be it

RESOLVED, That the proposed Master Plan for Washington National Airport, consisting of an Airport Land Use Plan, Airport Layout Plan, and a Terminal Area Site plan, each dated March 4, 1988 and prepared by Howard Needles Tammen & Bergendoff, is hereby approved and adopted, effective thirty days after submission to the Board of Review.

/s/ Gregory Wolfe  
GREGORY WOLFE  
Secretary

(Adopted at MWAA Board of Directors Meeting, March 16, 1988)

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 18**

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**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY  
BOARD OF REVIEW**

Washington National Airport  
Washington, D.C. 20001

**MINUTES OF APRIL 13, 1988**

The third meeting of the Board of Review of the Metropolitan Washington Airports Authority was held Wednesday, April 13, 1988, in Room H-301 of the Capitol and was called to order by the Chairman at 8:10 a.m.

*Members Present:*

Norman Y. Mineta, Chairman  
Silvio O. Conte  
John Paul Hammerschmidt  
William Lehman  
Dan Rostenkowski

*Authority Representatives Present:*

James A. Wilding, General Manager  
Edward S. Faggen, Legal Counsel  
Francis J. Conlon, Chief Engineer  
Nancy Bruce, Governmental Affairs  
Gregory Wolfe, Secretary and Counsellor to the  
Board of Directors

**I. APPROVAL OF MINUTES**

The first order of business was approval of the minutes of the last meeting, held February 24, 1988. The minutes were unanimously approved.

**II. ACTION ON RESOLUTION NO. 88-8 ADOPTING  
THE MASTER PLAN FOR WASHINGTON NA-  
TIONAL AIRPORT**

*Action Pending Review*

Review of the adoption of the Master Plan for Washington National Airport. At its regular meeting March 16, 1988, the Board of Directors adopted the Plan by Resolution No. 88-8. The Secretary transmitted the Resolution to the Board of Review the same day.

Mr. Wilding made a presentation on the Washington National Master Plan using graphics and recent aerial photographs. He noted that National comprised 860 acres, of which 680 are above water. There were approximately 45,000 passengers daily, and 1,000 flight operations, half of which are by air carriers.

Mr. Wilding then referred to a display showing the key elements of the Master Plan for National, as adopted by the Board of Directors. He explained that the airfield would not be changed, except for a new taxiway system. General aviation activities would be moved from the north to the south end of the Airport. Commuter air carrier traffic would be shifted to the Main Terminal. The existing General Aviation, Commuter, and North Terminals, and two or three hangars would be demolished to create a major new terminal building.

At the completion of the Plan, the existing number of air carrier gates (44) would be preserved; 32 would be in the new Main Terminal and 12 would remain in the existing Main Terminal. Parking would be provided for 8,000 cars, increased from 4,700, in three garages.

The parking structures would be adjacent to the Metro system, and both parking and Metro would be connected to the new Main Terminal by two enclosed bridges. A completely new roadway system would be constructed,

with separate levels for arrivals and departures at the Main Terminal. Hangar 1 would be demolished, and a new parking structure constructed on that site to park waiting cabs, which now are stored on the roadways and in parking lots.

Mr. Wilding reported there would be over \$400 million spent for work over the next four to five years. Construction on some smaller projects would begin over the next two months.

Mr. Hammerschmidt asked if the bonds currently being marketed would cover only the portion of the Master Plan Mr. Wilding had described. Mr. Wilding responded that the bonds would cover the cost of projects in the "Early Development Program", including the first parking structure, demolition of Hangar 1, creation of the taxi storage area, certain apron work, and the roadway, and not the entire Master Plan.

Mr. Rostenkowski asked if the highway would have two decks. Mr. Wilding responded that there would be two levels immediately adjacent to the new terminal.

Mr. Lehman questioned if a rating on the bonds had been obtained. Mr. Wilding responded that the bonds had been triple-A, based on the credit of a bond insurer. A rating for the Authority's own credit would be obtained for more traditional financings in the future.

Mr. Mineta acknowledged the presence of members of the Citizens for the Abatement of Aircraft Noise (CAAN), stating he appreciated the correspondence he had received, and assured CAAN the Board of Review was aware of their concerns.

Mr. Mineta asked about the impact of the Master Plan on aircraft noise at National. Mr. Wilding responded that the Master Plan would not affect the noise at National, as noise is driven by activity levels, which would not be changed by the Plan.

Mr. Mineta cited the present level of activity—approximately 550 air carrier operations, 200 commuter operations, and 250 general aviation operations per day—and asked what changes were contemplated for the future. Mr. Wilding indicated the forecasts were for 350,000 annual air carrier operations, increasing to 375,000 in the more distant future, or about 1,060 daily.

Mr. Mineta asked if the Master Plan envisioned 24-hour operation of the Airport. Mr. Wilding responded that there was no relationship between the Master Plan and 24-hour operation. He explained the existing nighttime noise rule, which permits only the quietest aircraft to operate. Only two air carrier aircraft currently meet the standard. He also pointed out that the Authority had a Part 150 noise study under way, and that nighttime noise was a part of it. Any change in the nighttime noise rules would require rulemaking.

Mr. Mineta asked if flights still had to conform to the noise standards between 10:00 p.m. and 7:00 a.m. Mr. Wilding confirmed that the rule remained in effect, but noted that any flight scheduled to arrive before 10:00 p.m. could land until 10:30 p.m.

Mr. Mineta pointed out that any change in the noise regulations would have to be reviewed and approved by both the Board of Directors and the Board of Review.

Mr. Mineta asked what the Authority was doing at the Airport to be a better neighbor, and to reduce current noise levels. Mr. Wilding responded that the Federal Aviation Administration operations rules provided for noise abatement flight patterns along the Potomac River and noise abatement operating procedures. Mr. Wilding again made reference to the Part 150 Noise Study. He mentioned that another solution was increasing use of newer, quieter aircraft, but noted this is happening very slowly on its own.

Mr. Mineta asked whether flight paths would be spread out. Mr. Wilding responded that such a "scatter" plan would not be adopted. The Federal Aviation Administration had tried this approach unsuccessfully.

Mr. Mineta asked how residents affected by the noise could get involved in developing solutions. Mr. Wilding said they could participate through the Part 150 Noise Study and a number of other mechanisms. The Northern Virginia Planning District Commission and the Committee on Noise Abatement at National and Dulles Airports (CONANDA) were working with the Authority on noise issues at both Washington National and Washington Dulles Airports.

Mr. Mineta inquired who was actually listening to the residents, noting that they complained that no one was. Mr. Wilding responded that there is a distinction between listening and agreeing. He believed the Authority had always listened, but had not necessarily agreed. He also mentioned that he had held discussions with several people who were in the audience.

Mr. Mineta asked who should be contacted at the Authority to report noise complaints. Mr. Wilding indicated that noise complaints could be reported to Sue Silverman, Community Relations Officer, or to the operations office.

Mr. Mineta asked the status of the Part 150 Noise Study. Mr. Wilding said it should be completed by August.

Mr. Mineta asked how citizens could be informed about noise briefings or noise abatement measures. Mr. Wilding responded that information was available from the technical staff, the community relations staff, or himself.

Mr. Mineta asked if there were any bias favoring liberalization of the nighttime noise rule. Mr. Wilding responded if there were any tilt, it would be against loosening the rule. He said he believed that nighttime noise levels would be tightened up.

Mr. Mineta asked about traffic peaks. Mr. Wilding replied that the High Density Rule, limiting the number of scheduled air carrier flights to 37 per hour, prevented "peaking".

Mr. Mineta asked about the increase in the number of passengers at National. Mr. Wilding reported there are now 15.7 million passengers, and the forecasts showed growth to 19.5 million passengers over the next 17 years. Most of the growth would come through increased load factors (now at 55 percent), more origin and destination traffic, and the introduction of two-engine "widebody" aircraft.

Mr. Lehman commented that the problem did not appear to be the twelve flights after 10 p.m., but repeated operations in other hours. If the people would have to live with the noise, they should be told so.

Mr. Wilding again mentioned the increased numbers of quieter aircraft. Mr. Lehman commented that they would be introduced over 10 to 15 years, a relatively long period. He also repeated that the people should not be misled about improvements in noise levels. Mr. Wilding responded that no one had ever told the community the noise problem would disappear. Mr. Lehman noted the message appeared to be that noise would not get worse. Mr. Wilding agreed that the noise would not get worse, but would improve "glacially".

Mr. Mineta asked about the noise generated by general aviation jets. Mr. Wilding responded that there would be some growth in general aviation operations, but without a significant noise impact.

Mr. Rostenkowski asked why the slot limitations at National did not prevent general aviation aircraft from landing or taking off at any time. Mr. Wilding noted that the High Density Rule, applied to Instrument Flight Rule conditions only, which meant there could be additional general aviation operations in Visual Flight Rule

conditions. Mr. Mineta asked if general aviation aircraft were subject to the noise regulations. Mr. Wilding responded that they were.

Mr. Mineta then explained the negative procedures peculiar to the Board of Review. Mr. Rostenkowski thereupon moved to disapprove the Washington National Airport Master Plan. The motion to disapprove was unanimously rejected.

The Chairman then asked Mr. Wilding to address the Dulles Airport Access Road proposal.

### III. BRIEFING ON THE AUTHORITY'S PROPOSAL TO CHANGE ITS CURRENT REGULATION TO PERMIT HIGH OCCUPANCY VEHICLE USE OF THE DULLES ACCESS HIGHWAY ON A TEMPORARY BASIS.

Mr. Wilding explained that Washington Dulles International Airport includes the Dulles Access Highway, which had been built in 1960. In 1959, a policy to reserve the Access Highway for Dulles Airport traffic only had been announced.

During the 1970s, exceptions had been granted for Wolf Trap Farm Park traffic and commuter buses. In the early 1980s, carpools and commuter traffic were allowed to use the Access Highway on a temporary basis, until the Dulles Toll Road was completed.

In 1984, the exceptions terminated when the Dulles Toll Road opened adjacent to the Access Highway. After a year or two, traffic on the Toll Road had begun to build up to the point that it became seriously congested. Congressman Frank Wolf had urged the construction of slip ramps from the Toll Road to the Access Highway for use by commuter buses. Secretary of Transportation Elizabeth Dole had approved the proposal, and they had been in operation for two years.

Mr. Wolf and Fairfax County now proposed to broaden the current exemption to allow vanpools and carpools to use the eastbound ramp as well. It appeared the Authority could help eastbound traffic on the Toll Road in the morning if the half of the Access Highway east of Reston could be used for two hours a day by vanpools and carpools.

The Access Highway could accommodate up to 4,000 cars per hour. On the section now being considered for non-airport use, there are 1,275 cars per hour. An additional 200 to 500 vehicles per hour, the projected demand, would only bring the total up 1,775 per hour at worst. The proposal under consideration would be for a limited period only, expiring when a third lane was added to the Toll Road.

Mr. Mineta asked when an additional lane would be constructed on the Toll Road. Mr. Wilding said the Virginia Department of Transportation expected to finish it in 1991.

Mr. Mineta then asked about traffic service levels on the Access Highway, noting that level F was expected for the Toll Road. Mr. Wilding responded they would stay between the B and C ranges.

Mr. Mineta then asked what the service level would be on the Toll Road in the morning peak hours after the third lane was complete. Mr. Wilding responded low C to high D range.

Mr. Mineta expressed concern that if the change was made, it would be difficult to convert back to exclusive airport use. Mr. Wilding agreed that there was a risk involved.

Mr. Mineta asked about the procedures for monitoring the vanpools and carpools. Mr. Wilding responded there would have to be positive police controls on the ramps.

Mr. Mineta commented that presently the only way for commuters to get into the Access Highway was by backtracking. Even though it was illegal and the rules were enforced by police, the congestion on the Toll Road leads motorists to attempt to cheat. Mr. Wilding said that the Authority Police enforced against backtracking, and that cheating was being reduced.

Mr. Mineta expressed reservations about the proposal, even though he was sympathetic to people who sit on the Toll Road. He emphasized, however, that the Access Highway had been built exclusively for airport users.

Mr. Hammerschmidt expressed his concern that granting carpool access would develop a strong constituency, and that it would be difficult to roll it back.

Mr. Mineta said he also believed that changes in the operation of the Access Highway would present Fairfax and Loudoun Counties with added incentives to develop more office buildings in the Access Highway corridor, further increasing roadway congestion.

Mr. Lehman also expressed reservations, noting that the Access Highway had been a direct federal project, built with General Funds from the U.S. Treasury, and without the customary state or local contribution.

Mr. Conte asked if there had been any discussion to provide access to Dulles by rail, recalling past federal efforts in that regard. Mr. Wilding responded it had been discussed, and mentioned the current DART proposal to connect Dulles with the Metro system using the reserved right-of-way in the median strip of the Access Highway.

#### IV. OTHER BUSINESS AND ADJOURNMENT

There being no further business, the meeting was adjourned at 9:02 a.m.

Respectfully submitted:

/s/ Gregory Wolfe  
GREGORY WOLFE  
Secretary

Approved August 9, 1988  
GW

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 12**

**RESOLUTION NO. 88-34**

**METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY**

**RESOLUTION**

**RESOLVED**, That Section 159.35 of the Metropolitan Washington Airports Authority Regulations is revised, effective September 12, 1988, to read as follows:

**§ 159.35 Use of Washington Dulles International Airport Access Highway**

(a) Except as provided in paragraph (b) of this section, a person may use the Washington Dulles International Airport Access Highway only for the purpose of going to, or leaving Washington Dulles International Airport for airport-related business, or, with the permission of the Airport Manager, or his designee, to perform work on the Highway. Use by any person of the Washington Dulles International Airport Access Highway for a purpose not authorized by this section is prohibited.

(b) *Exceptions.* No person may use the Highway for other than airport related business except:

(1) In (i) buses that are being operated in common carriage of persons by companies holding a certificate of public convenience and necessity for its operation and for which use of the Highway is appropriate, or (ii) in school buses as the term is defined in § 46.1-1(37) of the Code of Virginia.

(2) Until September 11, 1989, in a high occupancy vehicle ("HOV") occupied by three or more persons, provided:

(i) The vehicle entered the Highway at a point designated by an official sign as an HOV entry point;

(ii) The vehicle is traveling eastbound from the designated entry point in the eastbound lanes of the Highway; and

(iii) The vehicle is being operated during the hours of the day that HOV use of the Highway is authorized as provided on an official sign at the HOV entry point.

(c) No person may:

(1) Enter the Highway through other than a road or ramp approved by the Airport Manager or on his authority for that purpose;

(2) Exit the Highway through other than a road or ramp approved by the Airport Manager or on his authority for that purpose;

(3) Make a U-turn on the Highway;

(4) Enter upon or cross through the median strip of the Highway;

(5) Operate the vehicle in violation of operating signs posted on the Highway by the Airport Manager or on his authority. The fact that such signs are posted shall be *prima facie* proof that such signs were posted by the Airport Manager or on his authority.

(d) All violations of § 159.35 are classified as Class 4 misdemeanors, punishable by a maximum fine of one hundred dollars (\$100).

(e) All laws of the Commonwealth of Virginia and any ordinance or regulation of any political subdivision in which the Highway is located also apply.

/s/ Gregory Wolfe  
GREGORY WOLFE  
Secretary

(Adopted at Board of Directors Meeting, July 6, 1988)

**U.S. District Court for the District of Columbia  
Plaintiffs' Exhibit 11**

**RESOLUTION NO. BOR 88-1**

**BOARD OF REVIEW  
METROPOLITAN WASHINGTON  
AIRPORTS AUTHORITY**

**RESOLUTION**

WHEREAS, The Metropolitan Washington Airports Authority Board of Directors approved a change in the regulation of the Washington Dulles International Airport Access Highway (Access Highway) to permit high occupancy vehicle use thereof, in the east bound direction, during the morning rush hour only, on a temporary basis;

WHEREAS, The Access Highway was constructed by the Federal Aviation Administration with appropriated federal funds from general revenues;

WHEREAS, The Access Highway was intended for the exclusive use of air passengers and others with business at Washington Dulles International Airport;

WHEREAS, The Federal Aviation Administration provided right-of-way for the adjacent Dulles Toll Road without cost to the Commonwealth of Virginia;

WHEREAS, The Commonwealth of Virginia and its Counties of Fairfax and Loudoun have not provided adequate highway capacity for vehicle traffic in the rapidly developing Dulles corridor;

WHEREAS, The Dulles Toll Road, even with additional lanes, will operate at congested traffic service levels;

WHEREAS, The Dulles Toll Road will never have sufficient rush hour capacity to provide a free-flowing alternative to the Access Highway;

WHEREAS, Without adequate capacity for carpool traffic on the Dulles Toll Road, the Authority will find it difficult, if not impossible, to remove carpools from the Access Highway once such operations are allowed;

WHEREAS, the Authority's Engineering Division projects congested traffic service levels on the Access Highway as early as 1995 if carpools are permitted to use the Access Highway;

WHEREAS, there are serious questions about the ability and willingness of the Fairfax County Police to enforce a rule permitting only carpools to use the access ramp to the Access Highway;

WHEREAS, that the use of the Access Highway by carpools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport; now, therefore, be it

RESOLVED, That Resolution No. 88-34, adopted by the Metropolitan Washington Airports Authority Board of Directors July 6, 1988, and amending section 159.35 of the Authority Regulations to permit non-airport related, high occupancy vehicle use of the Washington Dulles International Airport Access Highway, is hereby disapproved.

Roll Call Vote  
*Members in Favor:*  
 Mr. Hammerschmidt  
 Mr. Hollings  
 Mr. Lehman  
 Mr. Mineta  
 Mr. Rostenkowski  
*Members Opposed:* None  
*Abstentions:* None

/s/ Gregory Wolfe  
 GREGORY WOLFE  
 Secretary

(Adopted at the Board of Review Meeting of August 9, 1988)

**U.S. District Court for the District of Columbia**  
**Plaintiffs' Exhibit 13**

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**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 88-3319 JHG  
 (Judge Joyce Hens Green)

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC.,  
 JOHN W. HECHINGER, SR.,  
 and

CRAIG H. BAAB,  
*Plaintiffs,*  
 v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
 and

BOARD OF REVIEW,  
*Defendants.*

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**AFFIDAVIT OF SHERWIN LANDFIELD**

I, Sherwin Landfield, hereby declare and state as follows:

1. I am on the Board of Directors of Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN"), one of the plaintiffs in this action.
2. CAAN is a nonprofit membership organization composed of citizens' groups and individuals from the Dis-

trict of Columbia, Maryland, and Virginia who wish to minimize adverse noise, safety, and environmental effects of air traffic at Washington National Airport. CAAN's bylaws, which are attached, describe CAAN's purpose and structure. Attachment 1.

3. CAAN's primary purpose is to encourage the development and implementation of a rational air transportation policy for the Metropolitan Washington D.C. area, which would include balanced service at the area's three airports, reducing aircraft operations at Washington National Airport, and consequently alleviating the noise, safety problems, and air pollution that result from such operations.

4. Most of CAAN's members live under the flight path going to and from National Airport. They are adversely affected by the noise, air pollution, vibrations, and safety threat from air traffic at National Airport. They are also adversely affected by the traffic congestion resulting from passenger activity at that airport. Some have developed health problems that they attribute to the air traffic, and others' property values have suffered as a result of their proximity to the airport or its flight path.

5. CAAN's members generally favor a nighttime curfew on air traffic and reduction in the level of daytime air traffic at National Airport, accompanied by an expansion of air services available at Dulles International and Baltimore-Washington International Airports.

6. The Airports Authority's Master Plan for National Airport will injure CAAN's members further because it proposes to expand the airport's facilities, to build them to accommodate wide-bodied jets, to increase passenger levels, and to increase air carrier traffic by utilizing currently unused slots. Washington National Airport Master Plan Presentation to MWAA Board of Directors at 1 (March 1988) (Exhibit 16).

7. The Airports Authority is implementing the Master Plan by issuing bonds to finance it and entering into construction contracts. In March 1988, the Airports Authority issued its first bond series, and it has since issued several additional bonds series to finance airport improvements.

8. If we are successful in this lawsuit, the Airports Authority will not have the power to implement the Master Plan or to otherwise expand National Airport, which will benefit CAAN and its members.

9. Previously, CAAN advocated its position with some success before Congress and the Federal Aviation Administration. However, since the transfer, CAAN's influence is greatly diminished because the congressional Board of Review excludes local representation and because the Representatives and Senators from Maryland and Virginia, and the District of Columbia Delegate no longer have any power over the airports. Before the transfer, some local representatives, such as Representative Frank Wolf from Northern Virginia, served on the committees that had oversight responsibilities over the airports so that they could better serve their constituents. However, now that Congress as a whole exercises no power over the airports, Representative Wolf has taken other committee assignments and made airport noise from National Airport less of a priority.

Pursuant to 28 U.S.C. § 1746 and Local Rule 106(g), I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of December, 1988.

/s/ Sherwin Landfield  
SHERWIN LANDFIELD

**U.S. District Court for the District of Columbia  
Defendants' Exhibit 8**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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C.A. No. 88-3319 JHG

Hon. Joyce Hens Green

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., et al.,  
*Plaintiffs,*

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, et al.,  
*Defendants.*

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**AFFIDAVIT OF JAMES A. WILDING**

COMMONWEALTH OF VIRGINIA	)
	) ss
COUNTY OF ARLINGTON	)

I, James A. Wilding, being duly sworn, depose and say:

1. I am currently the General Manager and Chief Executive Officer of the Metropolitan Washington Airports Authority ("Authority"), the operator of Washington National and Washington Dulles International Airports ("Airports"). The Board of Directors of the Authority appointed me to my current position on May 6, 1987. Prior to that, I served as Director of the Metropolitan Washington Airports when they were operated by the Federal Aviation Administration ("FAA"). I also

served as the Deputy Director and the Chief of the Engineering staff. I have been employed at the Airports in various capacities since 1959, and I am very familiar with their operation.

2. I am very familiar with the development of the Master Plan for National Airport and the content of that Plan. I am also familiar with the aircraft noise abatement issues at the Airports and with the on-going study of possible measures to further promote compatibility between National Airport and the surrounding communities. That study is being conducted in accordance with FAA regulation Part 150 and will be completed on or about May 1, 1989. Further, I am familiar with an organization called Citizens for the Abatement of Aircraft Noise ("CAAN"), the plaintiffs herein, and I have, on several occasions corresponded with members and representatives of CAAN, and met with them, to discuss the Master Plan for National Airport and aircraft noise abatement matters.

3. The Master Plan for National and aircraft noise abatement at National are two separate issues. The Master Plan, which the Authority's Board of Directors adopted on March 16, 1988, Resolution No. 88-8, consists of three maps—an Airport Land Use Plan, and Airport Layout Plan, and a Terminal Area Site Plan (Attachment A). The Master Plan for National Airport was developed to rehabilitate the Airport, not to expand it. The Master Plan for National Airport was developed to alleviate several serious problems at the Airport, including congested and confusing roadways associated with the existing physical plant; inadequate public parking; inconvenient access to the terminals from the Metrorail station; congestion and inadequate facilities and passenger amenities within the terminals; and on the airfield, inadequate apron taxiways. The Master Plan addresses these and other related areas. Under the Master Plan, a new terminal will be built, but it pre-

serves the existing number of gates for the air carriers' aircraft (44). The Master Plan also provides for a new dual level roadway system to improve and simplify traffic flow and parking structures to accommodate the public and waiting cabs so as to eliminate roadway congestion. The Master Plan does not change the airfield in terms of the number of runways, runway length, or runway orientation.

4. The lease agreement between the Authority and the U.S. Department of Transportation has placed certain restrictions on the Authority's discretion to alter the number of aircraft operations at National. The Authority cannot increase or decrease the number of aircraft operations authorized under an FAA regulation known as the High Density rule. The FAA High Density rule allocates 37 air carrier schedules or "slots" per hour. Further, the Authority cannot impose a limitation on the number of passengers using National.

5. Based upon my correspondence and personal discussions with CAAN representatives, it is clear to me that CAAN wanted the Authority to adopt a Master Plan for National Airport that would represent a lesser commitment to the rehabilitation of National Airport than the Plan that was adopted. CAAN sought a Master Plan which would make only essential repairs at National. CAAN's objective was to reduce the levels of activity at National and therefore sought to have that objective embraced by the Authority in its Master Plan. They envisioned a Master Plan that would have the effect of reducing aircraft and passenger activity at National by modifying past policy and legislative decisions which we view as cast in place by the lease.

6. The Master Plan that was adopted by the Authority did not adopt CAAN's proposals. The Master Plan adopted does not, consistent with the Authority's lease, reflect an intent to increase or decrease aircraft or pas-

senger activity. It is a Plan to rehabilitate, renovate, and modernize the terminal, roadway, and parking facilities for the activity that will occur there. The Plan does not expand the use of National and further, in my opinion, the Master Plan is noise neutral. It does not alter the number of aircraft operations, the flight paths utilized, or the type of aircraft allowed to operate at National. It does not increase the number of aircraft that will fly into the Airport at night (when the Airport is restricted to aircraft below a specified noise level). A forecast of activity prepared by the Authority in conjunction with the preparation of the Master Plan showed some increase in nighttime aircraft operations occurring, not as a result of the Master Plan but as a result of the production of more aircraft technologically capable of meeting the Authority's nighttime noise level regulation. The decision on what the regulated noise limits should be rests with the Authority, and a decision to operate at night with aircraft that meet the regulation rests with the aircraft operator. These decisions are not made in the Master Plan. The Master Plan does contemplate that the aircraft gates to be built at the new terminal will be able to accommodate some new technology or larger aircraft than use the Airport today. This will occur only if an air carrier wants to use these aircraft at National and the FAA determines that it is safe to do so. These newer aircraft, such as the A-300 and Boeing-767 are, as a general principle, substantially quieter than aircraft such as the Boeing-727, B-737, and the McDonnell-Douglas DC-9 which are the predominant aircraft in use at National Airport today.

7. The Master Plan was submitted to the Authority's Board of Review on March 16, 1988, and the Board of Review voted not to disapprove the Master Plan on April 13, 1988. The Master Plan is in effect.

8. I am familiar with the matters that have been referred to the Authority's Board of Review. In only one

instance has the Board of Review disapproved an action by the Board of Directors of the Authority. The Board of Review disapproved a change to the Authority's regulations that would have permitted non-Airport related traffic to use the Dulles Airport Access Highway. The Board of Review disapproved the proposed change because "the use of the Access Highway by car pools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport." Resolution No. BOR 88-1 (Attachment B).

9. As part of the Part 150 noise compatibility study, the Authority has considered many different noise abatement measures (Attachment C). Several of these measures are being considered in detail. Meetings with the general public have been conducted as part of this process, and CAAN, through the public review process, has had an opportunity to comment upon the measures and to influence the Authority with regard to this study. CAAN will have additional opportunity in the future to comment on specific noise abatement measures.

/s/ James A. Wilding  
JAMES A. WILDING

Subscribed and sworn to before me this 30th day of January, 1989.

/s/ Cynthia B. Howard  
Notary Public

My Commission Expires:

FILED  
MAR 1 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,  
*Respondents,*

UNITED STATES OF AMERICA,  
*Intervenor.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR THE PETITIONERS**

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## QUESTIONS PRESENTED

In 1987, the federal Executive and Congress, together with the executives and legislatures of the Commonwealth of Virginia and the District of Columbia, solved a seemingly intractable regional transportation problem —they transferred control over the airports serving the nation's Capital to an independent, nonfederal body created pursuant to state law. Washington National and Washington Dulles International Airports were long owned and operated by the federal government. Local residents, airport users, officials of both Virginia and the District as well as the airports' owner all recognized the growing need for regional control of the Washington metropolitan airports. But an acceptable means of accomplishing this transfer had proved elusive.

A major step toward a consensual solution occurred when a broad-based advisory commission appointed by Secretary of Transportation Elizabeth Dole recommended that control of the airports be transferred to a regional airports authority. Based on the commission's recommendations, Virginia and the District of Columbia each enacted legislation creating an independent regional authority. Congress then authorized the transfer of the airports to that nonfederal authority subject to certain conditions. To be eligible for such transfer, the nonfederal authority agreed to establish and appoint under state law a review board representing nationwide users of the airports to be composed of nine members of Congress serving in their individual—not legislative—capacities. The independent authority then adopted bylaws, pursuant to state law, which provide for the composition, appointment and specific powers of the review board. Virginia and the District of Columbia amended their enabling statutes to make clear that the authority was empowered to establish such a board.

In the case at bar, a divided court of appeals, overturning decisions by the district court, held the govern-

ing structure of this nonfederal airports authority unconstitutional on federal separation of powers grounds. Therefore, the questions presented are:

1. May the Commonwealth of Virginia and the District of Columbia create an independent nonfederal airports authority and authorize such authority to establish a board of review to represent airport users where (a) the authority appoints to the board, and has the power to remove, Members of Congress serving in their individual capacities and (b) the establishment of the board is a condition of the lease of federal property.
2. Whether a constitutional claim attacking the Board of Review is justiciable when the Board has not taken any action adversely affecting the respondents and the elimination of that Board would not redress the respondents' alleged injury.

#### PARTIES TO THE PROCEEDINGS

Petitioners are the Metropolitan Washington Airports Authority and its Board of Review. The Metropolitan Washington Airports Authority is a nonfederal public body corporate and politic with no parent company or subsidiary.

Respondents are Citizens For The Abatement Of Aircraft Noise, Inc., John W. Hechinger, Sr. and Craig H. Baab.

The United States of America exercised its statutory right to intervene in the court of appeals as a party and will appear in this Court because the constitutionality of an Act of Congress has been challenged.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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No. 90-906

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METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,  
*Petitioners,*

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CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., *et al.*,  
*Respondents,*

UNITED STATES OF AMERICA,  
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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the District of Columbia Circuit and an opinion dissenting therefrom are reported at 917 F.2d 48 (D.C. Cir. 1990), and are reprinted in Appendix ("App.") A to the Petition for a Writ of Certiorari of the Metropolitan Washington Airports Authority, *et al.* (Pet. App.

1a).<sup>1</sup> The opinion of the district court is reported at 718 F. Supp. 974 (D.D.C. 1989), and is reprinted as App. C at Pet. App. 29a.

#### **JURISDICTION**

The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. App. B at Pet. App. 28a. The petition for writ of certiorari was filed on December 10, 1990 and granted on January 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

#### **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED**

United States Constitution, art. I, § 1; § 6, cl. 2; § 7, cl. 2 and 3; art. II, § 1; § 2, cl. 2; and art. IV, § 3, cl. 2.

The Metropolitan Washington Airports Act of 1986, 49 U.S.C. app. §§ 2451-2461 (1988).<sup>2</sup>

1985 Va. Acts ch. 598 and 1987 Va. Acts ch. 665.

D.C. Law 6-67 (1985) and D.C. Law 7-18 (1987).

The constitutional, statutory and other provisions involved are reprinted in App. E at Pet. App. 58a.

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<sup>1</sup> Relevant opinions and the constitutional, statutory and other provisions involved were included in the Appendix to the Petition for a Writ of Certiorari of the Metropolitan Washington Airports Authority, *et al.*, filed on December 10, 1990. Citations to material printed in that appendix appear as "Pet. App. ——a." Citations to other portions of the record below are included in the Joint Appendix filed with this brief. All references to the Joint Appendix appear as "J.A. ——."

<sup>2</sup> All references to the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-373, reenacted in Pub. L. No. 99-591, 100 Stat. 3341-376 (codified at 49 U.S.C. app. §§ 2451-2461 (1988)) are cited to the relevant statutory section but omit repeated references to "49 U.S.C. app.".

#### **STATEMENT OF THE CASE**

##### **A. Creation Of The Metropolitan Washington Airports Authority By The Commonwealth Of Virginia And The District Of Columbia.**

Commercial airports in the United States are operated, almost exclusively, by regional, state or local authorities. Two exceptions were Washington National Airport ("National") and Washington Dulles International Airport ("Dulles"), both owned and operated by the federal government from their opening (in 1941 and 1962, respectively) until March 1987, when they were leased to the newly formed Metropolitan Washington Airports Authority ("Airports Authority" or "Authority"). Over the years, efforts to transfer control of these airports to some type of local ownership had failed due to a lack of agreement among the affected parties as to how best to accomplish such a transfer. To overcome this lack of consensus, the Secretary of Transportation ("Secretary") appointed the broad-based Advisory Commission On The Reorganization Of The Metropolitan Washington Airports (the "Holton Commission," named for its Chairman, former Virginia Governor Linwood Holton) and charged it with developing an acceptable means of transferring control of the metropolitan airports to a state, local or interstate public entity. See J.A. 12-24. The Holton Commission recommended to the Secretary that the federally-owned Washington airports be leased as a unit to "a single, independent public authority to be created jointly by the Commonwealth of Virginia and the District of Columbia." J.A. 15.

To this end, the Virginia Assembly enacted legislation, which the Governor signed on April 3, 1985, authorizing creation of a nonfederal regional airports authority to acquire both National and Dulles from the federal government. 1985 Va. Acts ch. 598 (Pet. App. 87a). The City Council of the District of Columbia approved a sub-

stantially identical law which was signed by the Mayor on October 9, 1985. D.C. Law 6-67 (1985) (Pet. App. 119a). The reciprocal Virginia and D.C. statutes, consistent with the recommendations of the Holton Commission, established the Metropolitan Washington Airports Authority as a "public body corporate and politic" "independent" of all state and federal governmental bodies. *E.g.*, 1985 Va. Acts ch. 598, § 2 (Pet. App. 89a). The two jurisdictions empowered the Authority to acquire the airports by lease from the federal government and generally consented, subject to gubernatorial and mayoral approval, to lease conditions set forth by Congress "that are not inconsistent with [the Virginia or District] Act." *Id.* at § 3 (Pet. App. 89a); D.C. Law 6-67, § 4 (1985) (Pet. App. 122a).

#### **B. Authorizing The Lease Of The Airports.**

A year later, Congress in the Metropolitan Washington Airports Act of 1986 ("Transfer Act") (Pet. App. 60a) authorized the transfer of the federal airports to the new regional authority created by Virginia and D.C. law. Like the reciprocal D.C. and Virginia enabling statutes, the Transfer Act embodied the recommendations of the Holton Commission "[i]n all significant respects." S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The Act authorized the Secretary to negotiate a 50-year lease with the state-created Authority and directed that certain minimum terms and conditions be incorporated in the lease. § 2454(a); see S. Rep. No. 193 at 12-15. Among those conditions and financial obligations was payment of an annual base rental of \$3 million, subject to an inflation adjustment. § 2454(b).

#### **C. Integrating Local And Nationwide User Interests In Structuring The Regional Authority.**

As provided in the Virginia and District statutes, the Transfer Act required the lessee authority to be independent of federal, state and local governments. § 2456

(b) (1). Congress explicitly recognized that the lessee authority was to have no federal powers or authority, but only those powers that the legislative bodies of Virginia and the District of Columbia conferred on it. § 2456 (a). Consistent with the reciprocal Virginia and D.C. legislation, the Authority was to be governed by an 11-member board of directors—five directors appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President of the United States with the advice and consent of the U.S. Senate. § 2456(e)(1). To ensure a truly local board, all directors, with the exception of the presidential appointee, must reside within the Washington metropolitan area. § 2456(e)(2); see S. Rep. No. 193 at 13; J.A. 17.

Congress' deliberations, however, also reflected a concern that service could decline at National under local control. See Plaintiffs' Exhibit in the United States District Court ("Pl. Ex.") 1 at 15 ("[t]hese Members can be expected to seek assurance that a new airport authority will have national as well as local interests in mind"). The Washington airports are, of course, used by citizens throughout the United States who travel from their home residences to the nation's Capital for business (public or private) or pleasure. § 2451(3); see 132 Cong. Rec. S3295 (daily ed. Mar. 25, 1986) ("constituents need to come to Washington, DC, to petition the Federal Government, to petition Congress") (statement of Sen. Pressler). Not surprisingly, Members of Congress, among the more frequent users of the Washington airports, rely upon the availability of convenient air services to and from their home districts. See, e.g., *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040 and S. 1017 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986) (hereinafter "Hearings") ("Members of Congress are heavy users of

the air transportation system. Your busy schedules include many trips back to your districts. You depend on the ability to get to the airport quickly, to park quickly, to get to the airplane quickly.") (statement of Secretary Dole); 132 Cong. Rec. S3294 (daily ed. Mar. 25, 1986) ("I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.") (statement of Sen. Danforth); Pl. Ex. 1 at 4 ("business travelers and Members of Congress like the convenience of [National] airport").

To protect the interests of nationwide users, Congress added a condition to the transfer. To be an eligible lessee, the nonfederal regional authority would agree to create a board of review under state law with disapproval power over certain of its Board of Directors' actions. § 2456(f).<sup>3</sup> The Board of Review would be composed of nine Members of Congress whom the Board of Directors would appoint and who would be required to function "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f)(1); *see also* Bylaws of the Metropolitan Washington Airports Authority ("Bylaws"), art. IV, § 1 (Mar. 4, 1987) (Pet. App. 148a, 151a). The Authority's Directors would agree to appoint the Board of Review from lists of nominees submitted by the Speaker of the House and the President *pro tempore* of the Senate.<sup>4</sup> *Id.* Members of the Board of Review would be nominated from specified aviation-related committees (except for one at-large member,

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<sup>3</sup> In an advisory letter addressed to the Chairman of the House Subcommittee on Aviation, Assistant Attorney General for Legislative and Governmental Affairs John R. Bolton, Esquire, addressed the constitutionality of several proposals to require a board of review and concluded that the type of proposal ultimately adopted by Congress would be constitutional. *See J.A. 25-35.*

<sup>4</sup> The Authority's Board of Directors also has the right to reject any Member on the nominee lists and to request additional names. *See infra* ¶.

chosen alternately from the House or Senate). *Id.* To ensure that the Board of Review would represent nationwide user interests (and not duplicate the local interests protected by the Board of Directors), Members of Congress from Virginia, Maryland and the District of Columbia were ineligible. *Id.*

The Authority would agree to submit certain of its decisions to the Board of Review at least 30 days before those decisions are to become effective.<sup>5</sup> § 2456(f)(4)(A); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a). An action would take effect unless the Board of Review were to disapprove it and state reasons therefor within the specified time period. § 2456(f)(4)(C); Bylaws, art. IV, § 4 (Pet. App. 153a). To preserve the delicately crafted balance of local and nationwide user interests inherent in the governing structure, Congress provided that the lease should include a provision preventing the Authority from taking certain major actions if the Board of Review were barred from carrying out its functions as a result of a judicial order. § 2456(h); *see also* Bylaws, art. IV, § 9 (Pet. App. 154a). But Congress also indicated that, even if that were to occur, lease conditions should not prevent the Authority from conducting routine operations or from continuing to meet previously authorized obligations and capital expenditures requirements. § 2456(f)(4)(D); *see also* Bylaws, art. IV, § 5 (Pet. App. 153a-154a).

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<sup>5</sup> These specified actions include: (i) the authorization for the issuance of bonds; (ii) the adoption, amendment or repeal of a regulation; (iii) the adoption or revision of a master plan (including land acquisition proposals); and the appointment of the chief executive officer. § 2456(f)(4)(B); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a). In addition, the Authority would agree to submit the adoption of an annual budget to the Board at least 60 days before it is to become effective. § 2456(f)(4)(A); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a).

#### **D. Negotiating And Accepting The Lease Conditions.**

On March 2, 1987, the Secretary and the Authority concluded negotiations and voluntarily entered into a lease (effective June 7, 1987), which was also signed by the Governor of Virginia and the Mayor of the District of Columbia. *See Lease of the Metropolitan Washington Airports Authority ("Lease")* (Pet. App. 163a). Under the Lease, the powers of the Secretary are to be construed in accordance with federal law, while the powers of the Authority are "construed in accordance with and governed by Virginia law." (Pet. App. 184a). That Lease, which incorporated provisions that are consistent with the Transfer Act, provided, *inter alia*, for the establishment of a Board of Review. Lease, art. 13 (Pet. App. 175a-178a).

Two days later, the Authority's Board of Directors adopted Bylaws pursuant to the Virginia and District of Columbia statutes. Those Bylaws required the Directors to establish a Board of Review and appoint thereto "representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities." Bylaws, art. IV (Pet. App. 151a-154a). The Bylaws provide for the composition and specific powers of the Board of Review, consistent with provisions of the Lease and the Transfer Act. *Id.*; *see supra* 6-7.

In negotiating the Lease, the Authority could have relied exclusively on the language contained in the enabling statutes of Virginia and the District giving "general consent . . . to conditions imposed by the Congress" as sufficient state authority to establish the Board of Review. Both jurisdictions, however, chose to amend their enabling legislation to make explicit the Authority's power to establish the Board under state law. *See* 1987 Va. Acts ch. 665, § 5.A.5 (Pet. App. 111a); D.C. Law 7-18, § 3(c)(2) (1987) (Pet. App. 143a).

#### **E. Appointing The Members Of The Board Of Review.**

By September 2, 1987, the Board of Directors had completed its review of the lists of nominees provided by the Speaker of the House and the President *pro tempore* of the Senate and appointed the nine Board of Review members. The Speaker of the House had provided a list of six congressional committee member nominees for four positions on the Board of Review; the President *pro tempore* of the Senate had provided a list of four nominees for four other Board positions. The Directors discussed whether to request additional Senate nominees or reject one or more of the nominees submitted, but ultimately decided that neither would be necessary. *See* J.A. 57. In the two resolutions appointing the Board of Review members, the Board of Directors fixed the terms of each of the appointments by a drawing, but reserved the right to remove a member of the Board of Review for cause prior to the conclusion of his or her term. *See* Res. No. 87-12 (June 3, 1987) (J.A. 47-48); Res. No. 87-27 (Sept. 2, 1987) (J.A. 60).

#### **F. Adopting The Master Plan.**

In October 1987, the Authority proposed a Master Plan for the renovation of Washington National Airport. After receiving comments from citizens groups including respondents, local governments and the general public, the Authority's Board of Directors adopted a resolution approving the proposed Master Plan. J.A. 70-71. Under the Master Plan, a new terminal will be built to replace the outmoded existing terminal. The new terminal will have the same number of aircraft gates (44). *See* J.A. 89-90; *see also* Pl. Ex. 16 at 3. To alleviate problems of ground congestion and inadequate public parking, the Master Plan also provides for a new dual level roadway system and parking structures. *Id.* The Master Plan does not change the number of runways, runway length or width, or runway orientation. *Id.* Nor will the Master

Plan increase the number of scheduled flights. Indeed, a provision in the Lease prevents the Authority, and the Transfer Act itself directly prohibits the FAA, from increasing or decreasing the number of permitted aircraft operations or slots (landing and takeoff rights). Lease, art. 11.F(1) (Pet. App. 172a); § 2458(e)(1).

The Authority submitted the Master Plan to the Board of Review on March 16, 1988. At the Board of Review's April 13, 1988 meeting, members asked a series of questions on the Plan's impact on traffic and aircraft noise levels. J.A. 73-78. In response, the Authority's General Manager stated that the Master Plan for rehabilitating National does not increase air carrier operations. J.A. 74; *see also* J.A. 89-90; J.A. 70-71 ("The Board of Directors is satisfied that the proposed Master Plan . . . will not bring about an increase in air traffic"). Nor does the Plan increase noise or address actions that can be taken to reduce aircraft noise. J.A. 74-75; J.A. 91 (plan was designed to be "noise neutral"). The Board was informed that various noise abatement measures were being considered by the Authority in a Part 150 noise study.<sup>6</sup> J.A. 75-76; J.A. 92. Assured that the Master Plan had no direct effect on traffic or noise and that other forums were available to concerned citizens in which to address the noise issue, the Board of Review on April 13, 1988 voted unanimously not to disapprove the National Airport Master Plan. J.A. 78.<sup>7</sup> The Board took no further action on the Master Plan.

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<sup>6</sup> FAA Regulation Part 150, 14 C.F.R. § 150 (1990), establishes a process for the nation's major airports to engage in planning to develop a noise compatibility program.

<sup>7</sup> In only one instance has the Board of Review disapproved an action by the Board of Directors. On August 9, 1988, the Board of Review voted to disapprove a revision of the Authority's regulations that would have allowed high occupancy vehicles to use the Dulles Access Highway temporarily. Concerned about the negative impact on airport traffic service levels and the difficulty of converting the Highway back to exclusive airport use, the Board of Review

#### G. District Court Proceedings.

In November 1988, respondents brought this action seeking declaratory and injunctive relief against the Airports Authority and its Board of Review. Respondents—a citizens group and two individual members of that group—claimed that they are injured by aircraft noise and safety problems allegedly caused by the implementation of a Master Plan for National that the Authority adopted and the Board of Review did not alter or disapprove. Respondents' lawsuit, however, is not based on environmental or safety statutes. Rather, respondents mount a constitutional challenge to the mere existence of the Board of Review's unexercised disapproval power. Cross-motions for summary judgment were filed, with the Authority contending that the state-created Authority and its Board of Review abridge no provisions of the Constitutions of the United States or Virginia, which law applies to the Authority's powers under the terms of the Lease. The Authority also raised issues of ripeness and standing.

On July 20, 1989, the district court (Judge Joyce Hens Green) upheld the constitutionality of the Board of Review. 718 F. Supp. 974 (D.D.C. 1989) (Pet. App. 29a). The court first held that respondents had standing since their alleged injuries were "fairly traceable to the Master Plan" which would, the court found, "facilitate" increased air travel to and from National. (Pet. App. 41a). Reaching the merits, the district court ruled that the Board of Review was not a federal entity, did not exercise federal power, had no members appointed by or subject to removal by Congress and, therefore, presented no violation

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disapproved the revision, stating that "the use of the access highway by carpools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport." J.A. 83-84. Respondents have not claimed that this solitary action of disapproval by the Board of Review had any effect on them.

of separation of powers principles or of the Appointments, Incompatibility, or Ineligibility Clauses of the Constitution.<sup>8</sup>

#### **H. Appellate Proceedings.**

On appeal to the United States Court of Appeals for the District of Columbia Circuit, a divided panel concurred with the district court's ruling on standing but reversed on the merits. The majority (Buckley, J. and Wald, then-C.J.) found that the Board of Review is in effect an agent of Congress and therefore cannot constitutionally exercise executive power. Judge Mikva (now-C.J.) dissented, stating that he would affirm the district court's decision and uphold "a delicately-balanced and innovative institution of federalism." (Pet. App. 27a). On December 6, 1990, the court of appeals stayed issuance of its mandate pending the filing of a petition for writ of certiorari (Pet. App. 28a), and pursuant to Fed. R. App. P. 41(b), the mandate remains stayed.

On December 10, 1990, the Airports Authority petitioned for a writ of certiorari. Respondents did not oppose the granting of the petition. *See Brief in Response to Petition for a Writ of Certiorari.* The United States also filed a brief in support of Supreme Court review. In addition, the Commonwealth of Virginia filed a brief as *amicus curiae* in support of petitioners, stating that the court of appeals' decision "undermines the concept of federalism" by ignoring the fact that the Board of Review derives all of its powers directly from the state-created Airports Authority pursuant to the nearly identical statutes of the Commonwealth and the District of Columbia. *See Brief of the Commonwealth of Virginia as Amicus*

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<sup>8</sup> In a related case involving the identical constitutional claim brought by different plaintiffs in an entirely different factual setting, the district court (Judge Lewis F. Oberdorfer) also ruled in favor of the Authority. *See Federal Firefighters Ass'n, Local 1 v. United States*, 723 F. Supp. 825, 826 (D.D.C. 1989) (Pet. App. 57a).

*Curiae in Support of Petitioners ("Va. Cert. Pet. Br.")* at 1.

#### **SUMMARY OF ARGUMENT**

This is not a federal separation of powers case. No constitutional provision or doctrine precludes the Commonwealth of Virginia and the District of Columbia from establishing an independent nonfederal Airports Authority. Nor is such nonfederal Authority precluded from establishing, pursuant to state law, a Board of Review and appointing thereto Members of Congress to serve in their individual capacities as representatives of the airport users. Nor is there any constitutional reason why that Authority cannot negotiate voluntarily a lease of federal property conditioned upon the establishment of such a review board.

The Founding Fathers made a considered choice to permit Members of Congress to hold office in state government or state-created agencies. Several early Members did so themselves. Such dual federal and state office-holding is fully consistent with the Ineligibility and Incompatibility Clauses of the U.S. Constitution, which prohibit Members of Congress from holding only other *federal* offices. The Appointments Clause also applies only to the appointment of *federal* officers. Thus, no express provision of the Constitution precludes members of the Board of Review from undertaking the functions assigned to them by the state-empowered Authority.

The decision by the court below holding such a Board of Review unconstitutional constitutes an unprecedented and unwarranted intrusion of the federal separation of powers doctrine into legitimate state activity. The court completely ignored the fact that the Board was established by the nonfederal Airports Authority, derives its powers from state law, and consists of Members of Congress appointed by, removable by, and accountable to the nonfederal Authority—not Congress. But for the volun-

tary and independent actions of Virginia, the District of Columbia and the regional Authority, there would be no Board of Review performing functions relating to the local airports—functions that do not impinge upon the federal Executive which itself negotiated the lease conditions providing for such Board of Review.

The court below extended implicit separation of powers principles beyond their intended bounds by mischaracterizing the nature of the Board of Review and the functions and responsibilities of its members. Such members do not serve as “agents of Congress”; they do not “wield federal power.” To impute such a status to the Board members flies in the face of the language of the Transfer Act, which directed the Secretary to negotiate lease provisions empowering the Authority to appoint Board members who, as individuals, not as legislators, represent airport users. Such lease provisions are the basis for the Bylaws from which the members derive their powers. The flawed reasoning of the court below ignores the plain meaning of the federal statute, the Lease and the Bylaws and constitutes an assault on this Court’s longstanding precedent that statutes should be reasonably construed so as to save them from constitutional infirmity.

Congress’ Property Clause powers further support its direction to the Secretary to include a provision for a state-appointed Board of Review in the airports Lease to which Virginia and the District could consent. It is fully consistent with this Court’s precedent that the federal government may induce states to agree voluntarily to take actions that the federal government constitutionally may not be able to accomplish directly.

Moreover, the private parties who have brought this suit are without standing. Their alleged injury—a potential increase in aircraft noise—is purely speculative and not fairly traceable to any action of the Board of Review or its mere existence. Nor would the elimination of the Board redress such an injury.

In this case, there is no inter-branch dispute at any level of government, nor does any branch contend that another impermissibly intrudes upon its constitutionally assigned functions. Under these circumstances, an unprecedented extension of the separation of powers doctrine into state-federal relations is completely inappropriate and would undermine a successful and innovative venture in creative federalism.

#### **ARGUMENT**

##### **I. THE CONSTITUTION PERMITS VIRGINIA, THE DISTRICT OF COLUMBIA, AND THE AIRPORTS AUTHORITY THAT THEY CREATED, TO APPOINT MEMBERS OF CONGRESS TO SERVE ON THE NONFEDERAL AUTHORITY'S BOARD OF REVIEW.**

The constitutionality of the Airports Authority’s Board of Review is anchored in a fundamental decision taken at the Constitutional Convention in Philadelphia. That Convention specifically considered and rejected a ban on the simultaneous holding of congressional and state offices.<sup>9</sup> Consequently, nothing in the Constitution prohibits states from appointing individuals who are members of Congress to positions created by state law.

The historical practice of the Founders after ratification further supports a reading of the Constitution that permits members of Congress to hold nonfederal offices.

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<sup>9</sup> See *II Elliott's Debates* vol. 5 at 127, 378, 420-25, 503, 505-06 (2d ed. 1836) (rejecting proposal that national legislators be ineligible for state-established office). The Framers feared that barring dual federal and state officeholding would unduly limit the pool of talented citizens to one level of government or the other. As Madison noted, “[t]he Legislature of Virg[inia] would probably have been without many of its best members, if in that situation, they had been ineligible to Congs. & the Govt. & other honorable offices of the State.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, 389 (1937). Roger Sherman maintained that a state ineligibility requirement would be equivalent to “erecting a Kingdom at war with itself.” *Id.* at 386.

For example, George Leonard served simultaneously as a Massachusetts Representative to the First and Second Congresses and as a member of the Massachusetts State Senate. *Biographical Directory of the United States Congress, 1774-1989*, 1364 (1989). George Thatcher, a fellow Representative from Massachusetts to the First through Sixth Congresses simultaneously served as a state district judge in Maine for an eight-year period. *Id.* at 1923. Similarly, Philip John Schuyler had overlapping periods of service in both the New York State and the United States Senates.<sup>10</sup> *Id.* at 1778. This contemporaneous practice by the Founders offers weighty evidence that the Constitution does not prohibit dual state and federal officeholding by Members of Congress. *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (actions by Members of the First Congress provide contemporaneous and weighty evidence about the meaning of the Constitution); *see Mistretta v. United States*, 488 U.S. 361, 399 (1989) (Constitution does not prevent extrajudicial service by federal judges).<sup>11</sup>

<sup>10</sup> While the Constitution does not prohibit dual officeholding, states, of course, remain free to place limitations on their own officers. For example, Charles Carroll served simultaneously in the Maryland State and United States Senates from March 1789 through November 1792. But when Maryland passed a law disqualifying members of the State Senate who also held seats in Congress, Carroll resigned from the U.S. Senate because he preferred to remain a State Senator. *See Biographical Directory of the United States Congress, 1774-1989*, 748 (1989). Likewise, Aedanus Burke, a Representative from South Carolina to the First Congress, declined to be a candidate for reelection because his simultaneous service as a judge on the state circuit court was threatened when the legislature passed a law prohibiting state judges from leaving the state. *See id.* at 704.

<sup>11</sup> In recent years, the Governor of Maryland has appointed a Member of Congress to the state Legal Services Board, the Governor of Massachusetts has appointed Members of Congress to the Board of Directors of the Massachusetts Centers for Excellence and the Governor of California has appointed a Member of Congress to the Commission of the Californias. *See, e.g.*, Defendants' Exhibit

The well-established practice of the Founding Fathers demonstrates not only that Members may hold nonfederal office but also that nonfederal officials (including the Authority's Board of Directors) are free to appoint such Members. Nothing in the Constitution prohibits a non-federal official from appointing a Member of Congress to serve in a nonfederal executive, judicial or legislative capacity. That the members of the Board of Review are appointed by a nonfederal Authority is readily apparent from the express language of the relevant statutes, the starting point for any such analysis. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

**A. The Virginia And District Of Columbia Acts As Well As The Language Of The Transfer Act Make Clear That The Airports Authority And Its Board Of Review Are Independent, Nonfederal Entities Created Pursuant To State Law.**

The 1985 Acts of the Commonwealth and the District, following the Holton Commission's recommendations, expressly created the Authority as a regional body, "independent" of both federal and state government. 1985 Va. Acts ch. 598, § 2 (Pet. App. 89a); D.C. Law 6-67, § 3 (1985) (Pet. App. 122a). Those Acts empowered the Authority to negotiate for the transfer of the airports subject to appropriate lease conditions to be established by Congress. *See supra* 4. In the 1986 Transfer Act, Congress built upon the foundation already in place and authorized the Secretary of Transportation "to enter into a lease of the Metropolitan Washington Airports with the Airports Authority . . ." § 2454(a). The Transfer Act expressly recognized that this state-created Authority was to have only "the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia," § 2456(a), and was to be "independent of the . . . Federal Government." § 2456(b)(1). Having passed

in the United States District Court 9; Washington Post, November 3, 1988 at M.2.

legislation delegating to the Secretary the power to negotiate with a regional, independent Authority a lease that was to contain certain minimum conditions, Congress' role ceased.<sup>12</sup>

In authorizing the Secretary to enter into a lease with the Authority, the Transfer Act makes clear that it is the independent nonfederal Authority that would establish a Board of Review. § 2456(f)(1). Consistent with that condition, the Secretary and the independent Authority negotiated a Lease that defined the powers and composition of the Board to be established. Lease, art. 13 (Pet. App. 175a-178a). Even then, however, the Board of Review could not come into being until the Authority adopted Bylaws, pursuant to state law, establishing such a Board. The Bylaws set forth the composition and powers of the Board, which were consistent with the terms of the Lease. Bylaws, art. IV (Pet. App. 151a-154a). Because the Authority was created pursuant to reciprocal D.C. and Virginia legislation, and its Bylaws were adopted pursuant to those nonfederal statutes, the Board of Review and the powers it exercises are likewise creatures of state law.

The court of appeals wholly ignored this series of voluntary and intervening actions, agreements and enactments on the part of the federal Executive, Virginia, the District and the independent Authority. Instead the court below erroneously concluded that "it is federal law that resulted in the establishment of the Board of Review with its particular composition and authority." Pet. App. 12a. But congressional suggestion does not render subsequent independent state actions federal ones. Had the legislatures of Virginia and the District not enacted their enabling statutes, the Authority would not have existed. Had the Authority not entered into a Lease

<sup>12</sup> Congress did provide that if the Secretary entered into a lease, it could not take effect until thirty days after submission to Congress. § 2454(d). No one questions the constitutionality of that report and wait provision. See *Sibbach v. Wilson*, 312 U.S. 1 (1941).

with the Secretary, and then adopted Bylaws pursuant to its enabling statutes and consistent with the Lease, the Board of Review would not have existed. That the federal act authorizing transfer of the airports to an independent Authority "contemplates the Board's creation does not alter the Board's fundamental state parentage." (Pet. App. 22a) (Mikva, J. dissenting).

Recognizing that the Authority and its Board of Review are empowered by and function pursuant to state law is fully consistent with this Court's holding that the officials of an agency created pursuant to an interstate compact act under color of *state law*, for purposes of 42 U.S.C. § 1983, when carrying out functions under that compact. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-400 (1979). This is so even though the interstate compact is federally approved. Indeed, it would be unprecedented, as the Commonwealth of Virginia notes, Va. Cert. Pet. Br. at 8, if state legislation, and state officials acting pursuant thereto, were suddenly federalized simply because that independently-adopted state legislation harmonized with a congressional statute.

**B. Express Constitutional Provisions, Such As The Incompatibility Or Ineligibility Clause, Draw A Bright Constitutional Line Between Federal And Nonfederal Officeholding By Members Of Congress, Allowing Members To Serve On The Board Of Review In Their Individual Capacities.**

Consistent with the Founders' decision to allow dual state and federal officeholding, both the Incompatibility and the Ineligibility Clauses expressly prohibit Members of Congress from serving only in another *federal* office. There is no such bar to service in an individual capacity in any state-created office or as a member of a public corporate body independent of the federal government. The Ineligibility Clause provides that "[n]o Senator or Representative shall, during the Time for which he was

elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const. art. I, § 6, cl. 2 (emphasis added). Analogously, the Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2 (emphasis added).

Members of the Authority's Board of Review hold office pursuant to the Bylaws of the Authority, which functions pursuant to the laws of the Commonwealth of Virginia and the District of Columbia. Because Authority officials, including the Board of Review, are therefore not "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), they are not officers of the United States. It thus follows that neither the Ineligibility nor the Incompatibility Clause prohibits Members of Congress from serving in an individual capacity on that state-created Board. See *Signorelli v. Evans*, 637 F.2d 853, 861-62 (2d Cir. 1980) (because of concern that general government might out-recruit state governments, Incompatibility Clause bars only dual *federal* officeholding).

That members of the Board of Review are not acting as Members of Congress wielding federal power also is apparent from the plain language of the Transfer Act. The Act unambiguously states that the members of the Board of Review are to function "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f). The Lease and Bylaws similarly require the Directors to appoint to the Board of Review representatives of users who will serve in their individual capacities. Lease, art. 13.A (Pet. App. 175a); Bylaws, art. IV, § 1 (Pet. App. 151a). Because the Transfer Act is clear on its face that even though the Board is composed of Members of Congress, they are to function in their individual capacities as rep-

resentatives of the users of airports exercising state power, this Court need look no further. See *Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("'[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).<sup>13</sup> Similar to the statute at issue in *Mistretta v. United States*, 488 U.S. 361 (1989), Members of Congress here serve on the Board of Review not pursuant to their authority as elected congressional officials but because of their appointment as individuals by the Authority's Board of Directors, as the Transfer Act makes clear. *Id.* at 404 ("judges serve on the Sentencing Commission not

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<sup>13</sup> Relying on the Act's plain meaning also comports with this Court's well-established duty to construe the statute so as to save it from any constitutional infirmities. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979). The court below attempted to sidestep this duty by stating that it did not reach the issue of whether appointment to the Board of Review would violate the Incompatibility or Ineligibility Clause of the Constitution (Pet. App. 19a). But if, as the court concluded, the Board of Review "wields federal power" (Pet. App. 10a) and if its members are acting as "agents" of Congress (Pet. App. 18a) then inevitably the Board's appointees are "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. at 126, in contravention of these constitutional clauses. Such a conclusion requires the court below to ignore the express language of the Transfer Act, the Virginia and D.C. statutes, and the Lease and Bylaws of the Authority concerning the nature of the appointing authority and the functions of the review board appointees. Ignoring this express language in order to impute to Congress an intent to violate the Incompatibility and Ineligibility Clauses as well as the Appointments Clause and separation of powers doctrine would severely undermine this Court's well-established precedent that a statute should be construed so as to avoid constitutional problems. On the other hand, accepting the plain meaning of Congress' direction that Board appointees serve in their nonfederal, individual capacities causes the underpinnings of the court of appeals' separation of powers contentions to unravel because it is not Congress or its agents but individuals who also happen to be Members of Congress who "partake[] of an executive function" (Pet. App. 15a). See *infra* Section II.

pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs").

To the extent that this Court need look beyond the Transfer Act's language, its legislative history underscores that "Members of Congress are heavy users of the air transportation system." Hearings at 110 (statement of Secretary Dole). As one member commented, "I spend half my life at these airports." 132 Cong. Rec. S2992 (daily ed. Mar. 19, 1986) (statement of Sen. Hollings). Given their frequent use of and need for services at these two airports, it made eminent sense to have individuals who are Members of Congress represent the interests of airport users. See 132 Cong. Rec. S3293 (daily ed. Mar. 25, 1986) ("[m]ost Members are intensely interested in the amount of service to and from certain cities, from both National and Dulles") (statement of Sen. Kassebaum). That Members of Congress serve on the Board of Review does not make that Board either Congress or an agent of Congress. This situation is no different from *Mistretta*, where the presence of judges on the independent Sentencing Commission did not make that Commission a court. 488 U.S. at 394.

It also is a perfectly rational legislative judgment to have the members of the Board of Review be drawn from those committees most familiar with and involved in aviation issues (along with one person chosen alternately from Members of the House and Senate at large).<sup>14</sup> As in *Mistretta*, the "special knowledge and expertise" of these appointees would enhance their value as representatives of airport users. See 488 U.S. at 396. Because the individuals from Congress are users of the airports

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<sup>14</sup> Restricting the Authority's appointments to members of selected committees does not unduly limit the universe of eligible appointees: As many as 105 members of the House and 47 Senators serve on the relevant committees. Of course, 417 House members and 96 Senators are eligible for the at-large appointment.

and knowledgable about aviation matters, they are particularly well suited for insuring that the airports of the nation's Capital serve the various users.<sup>15</sup> See 132 Cong. Rec. H11106 (daily ed. Oct. 15, 1986) ("[a] board of review composed of Congressmen is created to protect the interests of all users of the two airports.") (statement of Rep. Hammerschmidt).

### C. Congress Has Not Unduly Encroached On The Constitutional Appointment Powers Of The Executive.

By establishing conditions for the federal lease of airport properties, the Transfer Act did not constitute an unconstitutional encroachment by Congress upon the appointment powers of the coordinate federal Executive branch. The power to appoint members of the Board of Review as well as to remove them is vested in the non-federal Authority.

#### 1. Congress Has Not Interfered With the Appointments Authority of the Executive.

The court below misconstrued the Appointments Clause cases of this Court in holding that impermissible institutional ties existed between Congress and the Board of Review. Pet. App. 17a-18a. Even respondents concede that the Authority, not Congress, appoints the Board of Review. Brief for Appellants (December 1, 1989) ("App. Br.") at 32-33. In contrast to *Buckley v. Valeo*, 424 U.S. 1 (1976), where this Court held that the Appointments Clause does not authorize Congress to vest appointment of Federal Election Commissioners in itself, Congress did not assume an appointment function more properly entrusted to another federal branch when it passed the Transfer Act.

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<sup>15</sup> Indeed, the one instance when the Board of Review disagreed with an action taken by the Board of Directors reveals that the Board of Review is in fact representing the interests of users. See *supra* note 7.

The Transfer Act, the Lease and the Authority's By-laws provide that the nonfederal officials on the Board of Directors (who are appointed by the Governors of Virginia and Maryland, the Mayor of the District, and the U.S. President) are to appoint the Board of Review from lists of nominees submitted by Congress. § 2456(f)(1); Lease, art. 13.A (Pet. App. 175a-176a); Bylaws, art. IV, § 1 (Pet. App. 151a-152a). The Lease requirement that the Board of Directors select members of the Board of Review from lists submitted by the Speaker of the House and the President *pro tempore* of the Senate raises no more concerns than the appointment process approved by this Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta*. In *Bowsher*, this Court was not troubled that the Comptroller General was nominated by the President from a list of three individuals recommended by the Speaker of the House and the President *pro tempore* of the Senate. *Bowsher*, 478 U.S. at 727. Similarly, this Court upheld Congress' power to require the President to appoint three federal judges to the Sentencing Commission after considering a list of six judges recommended by the Judicial Conference of the United States. *Mistretta*, 488 U.S. at 410 n.31. Congress often places conditions on the way in which an appointing authority may exercise its power of appointment. Sometimes appointments to a board must be bipartisan. See, e.g., 42 U.S.C. § 2996c(a) (1988) (Board of Directors of Legal Services Corporation shall consist of eleven members no more than six of whom may be of same political party). Sometimes appointees must be selected from lists of potential nominees. As long as the appointing authority retains ultimate responsibility in the selection of the appointees, these conditions are constitutional, even in circumstances, unlike here, where the Appointments Clause is directly applicable.<sup>16</sup>

<sup>16</sup> See 20 Weekly Comp. Pres. Doc. 1690, 1691 (Oct. 30, 1984) (Secretary of Transportation retains ultimate responsibility to

Most importantly, the Authority's appointment of the Board of Review is not analogous to the direct legislative appointment power that this Court rejected in *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), and upon which respondents so heavily relied in the courts below. In *Springer*, as in *Buckley v. Valeo*, the Philippine legislators usurped for themselves the appointment powers of the coequal executive—the Philippine Governor-General. The legislature did so by passing a statute that placed the voting power of government stock in several national corporations, which power the Governor-General had exercised exclusively, in a board that was composed of the Governor-General, the President of the Philippine Senate and the Speaker of the House. These three persons voted their shares to elect a Board of Directors, which in turn elected the managing agents from among their own number.

This Court, construing the Organic Act of the Philippine Islands as it applied to these coequal *coordinate* territorial branches of government, concluded that the legislature could not assume for itself the Governor-General's power to appoint. *Springer*, 277 U.S. at 203, 205. In this case, Congress has neither vested appointment power in itself nor has it impermissibly interfered with either the state or federal executive's appointment power. Indeed, because the Directors of the Authority and the Board of Review members are not federal officers, the strictures that the Appointments Clause places on Congress' power to vest the appointment authority outside the federal Executive branch are not directly implicated here. Cf. *Morrison v. Olson*, 487 U.S. 654 (1988).

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appoint members of Motor Vehicle Safety Review Panel because she may refuse to appoint persons submitted on lists by the Senate or House transportation committees or request additional lists).

**2. Congress Has Not Attempted to Gain a Role in the Removal of Executive Officials.**

A central theme in this Court's separation of powers decisions has been that Congress cannot "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of" removal of a federal executive officer. *Myers v. United States*, 272 U.S. 52, 161 (1926). In both *Bowsher* and *Myers*, this Court found that Congress had impermissibly but expressly reserved for itself the power to remove a federal officer charged with the execution of federal laws. The federal statute at issue in *Myers* granted the President power to remove certain postmasters of the United States *only* "by and with the advice and consent of the Senate." 272 U.S. at 56. In *Bowsher*, the federal statute provided that the Comptroller General was removable solely at the initiative of Congress, not only by impeachment but also by joint resolution of Congress for, among other things, inefficiency or malfeasance. 478 U.S. at 728. This Court invalidated those arrangements on the ground that the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher*, 478 U.S. at 722. Indeed, "[t]o permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." *Id.* at 726.

The Transfer Act differs strikingly from the statutes at issue in *Bowsher* and *Myers*. Nothing in the Transfer Act authorizes Congress to interfere with the removal of the Authority's officials. The President has authority to remove his appointee to the Board of Directors for cause. § 2456(e)(4). There are no other express removal provisions in the federal act. The Virginia and the District of Columbia enabling statutes, as well as the Authority's Bylaws, additionally provide that the Directors may be removed for cause in accordance with the laws of the

appointing jurisdiction. 1985 Va. Acts. ch. 598, § 4.E (Pet. App. 90a); D.C. Law 6-67, § 5(e) (1985) (Pet. App. 124a); Bylaws, art. I, § 1.d (Pet. App. 149a). Accordingly, the Governors of Virginia and Maryland and the Mayor of the District retain the authority to remove their appointees to the Board of Directors. *See, e.g.*, Va. Code Ann. § 24.1-79.6 (1985); D.C. Code Ann. § 1-309 (1987).

Further, the Board of Directors passed Resolutions Nos. 87-12 and 87-27, adopted in accordance with the Bylaws of the Authority, confirming its power to remove members of the Board of Review for cause. J.A. 47-48; J.A. 60. These Resolutions, particularly given the statutory silence on removal authority, are consistent with two long-standing principles adhered to by this Court. First is the principle that removal authority is vested in the appointing authority in the absence of expressed legislation to the contrary. *Carlucci v. Doe*, 488 U.S. 93, 99 (1988); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). As James Madison noted during the first session of the First Congress: "The power of removal result[s] by a natural implication from the power of appointment." 1 Annals of Cong. 496 (J. Gales ed. 1789).<sup>17</sup> The second relevant principle that this Court follows is to accord a narrow or literal construction to statutes in order to avoid constitutional problems that might otherwise arise. *See Morrison v. Olson*, 487 U.S. 654, 682 (1988); *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). An appropriate reading of the Transfer Act would vest removal authority over the Board of Review in the very Board of Directors that holds the appointing power. In fact, even respondents conceded that the absence of congressional removal power "eliminates one source of unconstitutionality." *See* App. Br. at 35.

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<sup>17</sup> Virginia's law is to the same effect. *See McDougal v. Guigon*, 68 Va. (27 Gratt.) 133 (1876).

The court of appeals, however, ignored these time honored principles and instead engaged in a speculative reading of the federal statute that neither party had argued. The court reasoned that because the Transfer Act states that the Board of Review must "consist of" Members of specified House and Senate committees, Congress effectively exercises removal power over the Board of Review by virtue of each House's right to remove any of its Members from any committee at any time. Pet. App. 18a. This peculiar construction of the Transfer Act has never been tested in practice. *Cf. Morrison v. Olson*, 487 U.S. at 682 (provision for termination of office of independent counsel had never been tested). And there is nothing in the record before this Court to support the proposition that by removing from one of the designated congressional committees a person who also serves on the Board of Review, Congress could terminate that official's nonfederal Board service. Indeed, the negotiated Lease and the Authority's Bylaws, which establish the operative terms of appointment and tenure, do not even contain the "consist of" language upon which the lower court premised its tortured statutory analysis. Instead, both the Lease and the Bylaws provide that the Board of Directors "shall appoint" Members of the specified committees. Lease, art. 13.A (Pet. App. 175a-176a); Bylaws, art. IV, § 1 (Pet. App. 151a-152a).

Just as this Court found that the court of appeals had overstated the matter in *Morrison v. Olson* when it described the Special Division's power to terminate an independent counsel as a "broadsword and . . . rapier," 487 U.S. at 682, this Court should find that the same appellate court overstated and misinterpreted the terms of the Transfer Act when it concluded that Congress had the power to remove members of the Board. Unlike *Bowsher* and *Myers*, this case does not involve an express attempt by Congress to gain a role for itself in the removal of executive officials, much less federal officials appointed by

the President. Nor, when read in light of longstanding principles of statutory construction and the Resolutions authorizing the Board of Directors to remove members of the Board of Review for cause, does the Transfer Act even implicitly raise the spectre of the improper exercise of removal power by Congress.

## **II. NEITHER THE TRANSFER ACT NOR THE BOARD OF REVIEW VIOLATES FEDERAL SEPARATION OF POWERS PRINCIPLES.**

The court below did not invalidate any particular provision of the Transfer Act. Nor did it point to any express provision of the Constitution, such as the Appointments, Incompatibility or Ineligibility Clause, as grounds for invalidating the congressional statute. Instead, the lower court erroneously found that "the Board of Review, as currently constituted, unconstitutionally vests executive functions in an agent of Congress," (Pet. App. 19a), and concluded that "the Board is prohibited by the constitutional doctrine of the separation of powers from carrying out those functions." Pet. App. 2a.

This conclusion of the court below, extending the separation of powers doctrine articulated by this Court in *INS v. Chadha*, 462 U.S. 919 (1983), to the Authority-created Board of Review, reaches far beyond the intended boundaries of well-established precedent. In *Chadha*, this Court noted that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." 462 U.S. at 951. Separation of powers principles, as defined by this Court, give meaning to the Constitution's allocation of the sovereign power of the *federal* government among its three *coequal* branches. *Id.* The doctrine may be violated if one federal branch interferes impermissibly with another's performance of its constitutionally assigned functions. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 433 (1977). It also may be violated when one federal branch assumes a function that

is more properly entrusted to another federal branch. *See Youngstown Sheet & Tube Co.*, 343 U.S. 579, 587 (1952); *see generally Mistretta*, 488 U.S. at 383; *INS v. Chadha*, 462 U.S. at 963 (Powell, J., concurring). However, this Court has never invalidated on separation of powers grounds a congressional statute that allegedly interfered with Executive powers, unless the challenged action also trespassed on some express provision in the Constitution. *See Buckley v. Valeo*, 424 U.S. at 118-24 (congressional action compromises the President's art. II appointment power); *Myers v. United States*, 272 U.S. at 176 (same); *Springer v. Philippine Islands*, 277 U.S. at 200-01 (same); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (Act of Congress impinges on Executive's art. II, § 2 pardon power); *see generally INS v. Chadha*, 462 U.S. at 999-1000 (White, J., dissenting).

Here, notwithstanding the court of appeals' *ipse dixit*, there is no evidence that the Board of Review is either an agent of Congress (indeed, all evidence is to the contrary) or exercising functions more properly entrusted to the federal Executive. As with other interstate compacts, Congress' conditional consent to creating the Airports Authority neither transformed it into a federal agency nor altered the fact that the Board of Review's authority is derived from state laws and the Bylaws of the independent Authority. *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987). As an integral part of the decisionmaking structure of a nonfederal regional Airports Authority, the Board performs functions that are commonly performed by local airport authorities throughout the nation. Tellingly, the federal Executive branch, whose powers respondents argue are infringed, is not contesting the creation of the Board of Review. Indeed, the federal Executive fully supports the Board of Review and the federal statute at issue here. And this Court has never invalidated a statute because of undue

intrusion on the Executive branch when that branch has expressly declined to oppose the law. Cf. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086-87 (C.D. Cal. 1989).<sup>18</sup>

Nor is it clear how the Board could function as an agent of Congress or aggrandize Congress' powers. The Board has no status as a congressional entity.<sup>19</sup> In contrast to the Comptroller General in *Bowsher*, the Board of Review does not have responsibilities that create a relationship with Congress. Unlike the Comptroller General, the Board of Review does not report to Congress; it does not investigate or analyze matters to help Congress in its decisionmaking process; its responsibilities are not framed in terms of obligations to Congress or work on behalf of Congress. Compare *Bowsher*, 478 U.S. at 741 (Stevens, J., concurring). At base, because Congress has

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<sup>18</sup> There is good reason why the federal Executive branch neither opposed the Board of Review nor considered it an intrusion upon its constitutional powers. It was members of the federal Executive branch who initially sought to transfer local airport responsibilities to a regional authority, who appointed the Holton Commission, who sought congressional authorization to lease the airport to a non-federal authority, who advised Congress on how user interests could be integrated constitutionally into the governing structure, who signed the Transfer Act into law, and who negotiated the lease of the airports to the nonfederal Authority, providing for a Board of Review. Moreover, the federal Executive branch retains the powers and responsibilities over the metropolitan Washington airports that it exercises with respect to all commercial airports nationwide, e.g., air traffic control and the regulation of navigable airspace, safety, airport certification and compliance. In sum, the Transfer Act provided the means by which the Executive branch was able to relinquish local operation of the airports for which it was not well suited and retain only the powers that were appropriately federal.

<sup>19</sup> Indeed, respondents' complaints that they are "disenfranchised," that the Board of Review "promote[s] the interests of users," and "that Members of Congress who represent local interests cannot serve on the Board of Review" are fully consistent with the reality that the Board is not an arm of Congress but a group of individuals representing airport users. *See Pl. Ex. 13 at 3; Pl. Ex. 14 at 2-3.*

neither the power to appoint the Board of Review nor to remove its members if they take actions with which Congress disagrees, *see supra* 26-29, the Board of Review is not a subterfuge for congressional control.

Significantly, neither respondents nor the court of appeals has cited a single case in which an Act of Congress was held to violate the separation of powers doctrine because it infringed on the powers of a nonfederal, non-coordinate branch. This absence of authority confirms that separation of powers is a principle that fundamentally operates horizontally—between the coordinate federal branches of government. That doctrine has limited, if any, application vertically in regulating the interrelationship between the federal government and the states.

That separation of powers concerns are limited to interference by one federal branch with a coordinate federal branch is well illustrated by *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), cert. denied, 395 U.S. 908 (1969). In that case, a Chinese alien, whose narcotics conviction had been pardoned by a state governor, challenged a congressional statute that disallowed gubernatorial pardons of such convictions from overriding the deportation orders of the U.S. Attorney General. The court concluded that the doctrine of separation of powers “has no application in the area of federal-state relations.” *Id.* at 501. Here too, where an Act of Congress indirectly affects only a *nonfederal* entity, separation of powers principles are equally inapplicable. *See Nixon v. Administrator*, 433 U.S. at 433; *Buckley v. Valeo*, 424 U.S. at 122.

Fundamentally, this simply is not a case like *INS v. Chadha*, 462 U.S. 919 (1983), where Congress, after it had legislated, continued to intrude upon authority delegated to the federal Executive. Here, Congress in no way interfered with the authority it delegated to the Secretary to determine whether to enter into a lease with the non-federal Airports Authority.

Even before Congress passed the Transfer Act, the legislative bodies of Virginia and the District had enacted laws creating a regional Authority. The Secretary entered into an arms-length lease agreement with that independent Authority. Had the Secretary determined that any of the conditions that Congress attached to the transfer established a congressional role that was impermissible, she could have refused to conclude the negotiations. The Mayor of the District of Columbia and the Governor of Virginia signed the Lease. They too could have withheld their consent had they concluded that Congress was intruding unduly. Thus, the executive and legislative branches of both the federal and state governments are in agreement here—all concurred in the creation of a nonfederal Airports Authority and in the Lease conditions. There is no interbranch conflict—at the federal or state level—as to whether the Transfer Act or actions taken pursuant to it are constitutional. Because the political branches have acted at the apogee of their power, this Court should be at its most deferential, resisting attempts to expand separation of powers concepts into areas to which they do not apply. *See Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

### **III. CONGRESS CONSTITUTIONALLY MAY CONDITION A TRANSFER OF PROPERTY ON STATE CREATION OF A BOARD OF REVIEW COMPOSED OF MEMBERS OF CONGRESS.**

The reasoning of this Court’s decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), provides yet another ground why Congress in the Transfer Act constitutionally could condition the lease of federal property on the establishment by a nonfederal entity of a Board of Review. In *South Dakota*, this Court ruled that even if Congress lacked authority, in light of the Twenty-first Amendment, to legislate a national minimum drinking age directly, it

nonetheless could employ its broad powers under the Spending Clause to make existence of a state minimum drinking age law a condition on the use of federal highway funds. *South Dakota v. Dole*, 483 U.S. at 206. If the states chose to accept such a condition by agreeing to legislate in areas where states constitutionally can, but Congress cannot, then the states would help Congress achieve objectives beyond its immediate constitutional reach. That is, an "independent constitutional bar" on direct congressional action is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210.

In this case, the Court need not decide whether Congress itself could create the Board of Review as currently structured. Here, Virginia and the District agreed to pass legislation creating the Authority, which established its own Board of Review, in order to become eligible for the transfer of property. The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Because this Court has "repeatedly observed" that "'[t]he power over the public land thus entrusted to Congress is without limitations,'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (citations omitted), Congress' discretion to act under the Property Clause is at least as broad as its power under the Spending Clause.

No one questions that under federal law, Virginia and the District of Columbia constitutionally could agree jointly to pass reciprocal legislation creating a Board of Review to which nonfederal officers would appoint Members of Congress functioning in their individual capacities.<sup>20</sup> Because the states (or a state and the District)

<sup>20</sup> Nor does the Virginia Constitution or state law prevent the Authority from appointing this Board of Review. The states themselves are not bound by the federal doctrine of separation of powers

constitutionally can compact to do so, Congress constitutionally may prescribe the same actions as conditions of eligibility for the lease of United States property. The lesson of *South Dakota*, equally applicable to Congress' Spending Clause or Property Clause powers, is that even assuming Congress is not empowered to achieve certain objectives directly, it nonetheless may achieve them indirectly. See also *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (Congress may request states to waive Eleventh Amendment immunity as a condition to congressional approval of an interstate compact); accord *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (although Congress has no power to regulate local political activities of state officials, it may request states to do so and withhold federal funds for a state's failure to comply). What Congress may not do is induce the states to engage in activities that the states could not constitutionally perform, such as to discriminate on the basis of race in administering the leased airports property. *South Dakota*, 483 U.S. at 210.

The court below ignored this Court's test in *South Dakota v. Dole* and instead concluded that Congress may not induce the states "to circumvent the functional constraints placed on [Congress] by the Constitution" (Pet. App. 14a). There is no support in this Court's decisions, however, for a two-tiered Constitution, in which certain functional separation of powers constraints, only implicit in the Constitution, are elevated above other prohibitions such as the Twenty-first Amendment or the Appointments

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and nothing in the Constitution suggests the contrary. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring). A state determines for itself how power shall be distributed among its governmental organs. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). Virginia applies its separation of powers doctrine in a flexible, pragmatic way. *Baliles v. Mazur*, 297 S.E.2d 695, 700 (Va. 1982); accord *Infants v. Virginia Hous. Dev. Auth.*, 272 S.E.2d 649, 658 (Va. 1980); see also Va. Code Ann. § 2.1-33.8 (Supp. 1990).

Clause. The issue as defined by this Court is whether Congress can induce the states to do something voluntarily that everyone concedes the states themselves have the power to do. The simple answer here is that Congress can.

Nor is this a case in which Congress is offering financial inducements that are so coercive as to transform encouragement into compulsion. *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). Virginia and the District were not the recipients of federal largesse and thus did not face the prospect of *losing* federal grant funds that they otherwise would have received, as in *South Dakota*, if they did not consent to the federal conditions. To the contrary, they agreed to create a regional authority that, *inter alia*, would reimburse the federal government for past capital investments, pay \$3 million annual rent (subject to an inflation adjustment), pay unfunded pension expenses, assume a substantial financial commitment for future rehabilitation and improvement of the airports, and make a \$23.6 million payment to the Civil Service Retirement and Disability Fund. Lease, arts. 12.B, 16; S. Rep. No. 193, 99th Cong., 1st Sess. 5-6 (1985). Virginia, the District, and the Authority they created, freely assumed these responsibilities because they concluded that the Lease arrangements in their entirety were both constitutional and in the interests of their constituents and airport users throughout the nation.

#### **IV. THE COURT OF APPEALS' DECISION TO GRANT RESPONDENTS STANDING WAS INCONSISTENT WITH ARTICLE III LIMITATIONS.**

To establish standing for Article III purposes, a party must show that (1) there is a personal injury fairly traceable to the challenged action or conduct; and (2) the injury is likely to be redressed by the requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The court below found, contrary to the record evidence, *see infra* 37-38, that the Master Plan "pro-

vides for a significant increase in air traffic." Pet. App. 9a. The court then reasoned that respondents' harm from noise and air pollution is "fairly traceable" to the Master Plan, which the Board of Review did not disapprove, "because only with the Board of Review in operation can the Authority carry it out." *Id.* The court below also found that a favorable ruling would redress respondents' alleged injuries "because if the Board's actions are invalidated,"—even though the Board took no action with respect to the Master Plan—"then, under the provisions of the Act, the Authority will be unable to implement the Plan and continue expansion." *Id.* Neither the record, nor the Transfer Act and other applicable statutes, nor Supreme Court precedent support this tortured reasoning.

##### **A. Respondents' Alleged Injuries Are Not Fairly Traceable To Petitioners' Conduct.**

Respondents allege that they have been "adversely affected by the noise, vibrations, and the environmental consequences of the air traffic going to and from [National]" for "the past 38 years" in one case, (Pl. Ex. 14 at 1), and for 19 years in another (Pl. Ex. 15 at 1). Thus, these asserted injuries cannot be fairly attributed to the challenged Board of Review (in existence for only three and one-half years) and a Master Plan that is only now being implemented, as opposed to other factors. This Court requires respondents to show that the Board of Review's vote not to disapprove the Master Plan is more than merely one of the independent actions leading to respondents' asserted injuries. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-44 (1976); *Warth v. Seldin*, 422 U.S. 490, 507 (1975).

Respondents cannot do so, however, because the noise and environmental issues long associated with National are caused by a variety of factors, none of which are attributable to the Board of Review's existence or the implementation of the Master Plan. The Master Plan is a plan to renovate and rehabilitate the aging facilities at

National and is designed to be "noise neutral."<sup>21</sup> J.A. 91; *see supra* 9-10. It maintains the existing runways; provides for the same number of gateways as exist today; and does not increase the number of permissible flights.<sup>22</sup>

Moreover, under federal law and the terms of its Lease, the Authority has virtually no ability to restrict (or increase) aircraft operations or limit the number of passengers at National.<sup>23</sup> It is not the Master Plan but the airlines and the FAA which will determine the number of

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<sup>21</sup> While it is true that the Master Plan provides for gate improvements that will accommodate new widebody aircraft more effectively, the use of such aircraft would occur only if the FAA certifies the new aircraft for use at National. Moreover, since these aircraft are substantially quieter than those they will replace, the renovation of airport facilities to accommodate them actually could ameliorate some of the problems of which respondents complain. J.A. 91. Similarly, the renovations called for under the Master Plan, if anything, will increase airport safety and reduce traffic congestion by bringing National Airport "up to contemporary standards." Pl. Ex. 16 at 1.

<sup>22</sup> The courts below attributed the modest growth in air traffic shown in the forecasts prepared for the Master Plan to the Master Plan itself (Pet. App. 9a; Pet. App. 41a). Such growth, however, is not a result of airport layout changes but rather is an estimate of the increasing number of quieter, new technology aircraft that will be able to comply with existing nighttime noise limits. J.A. 91; Pl. Ex. 16 at 1. These technological advances and any resulting airline procurement choices will occur irrespective of the Master Plan.

<sup>23</sup> Congress required lease conditions prohibiting the Authority from increasing or decreasing the number of operations or slots permitted under the FAA's High Density Rule and from limiting the number of passengers at National. § 2454(c)(5)(C). Congress also has prohibited the FAA from decreasing the number of slots permitted under its Rule, except for reasons of safety. § 2458(e)(1). The FAA, not the Authority, continues both to administer the High Density Rule and to certify widebody aircraft for service at National and other airports. Further, the FAA retains exclusive jurisdiction over airspace, including, *inter alia*, matters of safety and air traffic control, airspace congestion and noise abatement procedures. 49 U.S.C. §§ 1348, 1431 (1988).

aircraft operations, the aircraft flight patterns and the aircraft types operated at National. J.A. 91.

Attempts to link the Master Plan and respondents' harms are far too strained to establish standing, given the constraints in the Authority's Lease and the critical role played by third parties' decisions. *See Simon v. Eastern Ky.*, 426 U.S. at 42-44 (denying standing to a group of indigents challenging an IRS ruling because it was "purely speculative" whether the alleged denials of hospital service could be fairly traced to the IRS or simply resulted from the hospitals' independent decisions); *see also Allen v. Wright*, 468 U.S. 737, 759 (1984). Here, it is at least as speculative whether there will be any increases in noise, pollution or safety problems that could be traced to the "noise neutral" Master Plan or whether such increases, if in fact they materialize, instead would be the result of decisions made by the airlines and the FAA with or without the Master Plan or the Board of Review.

#### B. Respondents' Requested Relief Will Not Redress Their Claimed Injuries.

Equally important, respondents cannot show that there is a "substantial likelihood" that a judgment in their favor will redress their claimed injury. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). Respondents seek to declare the Board of Review's disapproval power unconstitutional and to enjoin the Airports Authority from either performing functions that require Board review or implementing the Master Plan. J.A. 4. Here, as a matter of law, invalidating the Board of Review and enjoining certain actions by the Authority would not affect the level of air service. *See* §§ 2454(c)(5)(C), 2458(e)(1). Nor would such relief have any predictable effect on the injuries of which respondents complain. Indeed, because under the terms of the Lease and its Bylaws the Authority would be pre-

vanted from taking any action that requires submission to the Board of Review if the Board is invalidated, the effect of respondents' requested relief would be to preclude the Authority from taking specific action to address the very concerns that respondents raise, *e.g.* by issuing noise-related regulations within the Authority's power. Lease, art. 13.H (Pet. App. 178a); Bylaws, art. IV, § 9 (Pet. App. 154a). Respondents' claim that they would be better off if the Authority were unable to take certain actions in the future is probably wrong and, in any event, is sheer conjecture of the sort insufficient to support a claim of standing. *See Warth v. Seldin*, 422 U.S. 490, 507 (1975) (petitioners' assertion of standing fails because they "rely on little more than the remote possibility . . . that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief")<sup>24</sup>; *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

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<sup>24</sup> Congress directed that the Lease require the Authority to operate and *develop* both National and Dulles and encouraged the expeditious completion of the Master Plan. §§ 2454(c)(1), 2455(a); *see also* S. Rep. No. 193, 99th Cong., 1st Sess. 11, 13 (1985). Thus, respondents in essence seek to invoke this Court's assistance in forcing Congress again to consider and address issues that they unsuccessfully asked Congress to address in 1986. Hearings at 266-67 (statement of Annette D. Davis).

## CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this Court reverse the decision below on the merits and uphold the constitutionality of the non-federal Airports Authority including its Board of Review or reverse the decision below in view of respondents' lack of standing.

Respectfully submitted,

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FILED

NOV 1 1991

CLERK OF THE COURT

In the Supreme Court of the United States

OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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## **QUESTIONS PRESENTED**

The Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451 *et seq.*) requires, as a condition of leasing federally owned airports to a regional Airports Authority established by the Commonwealth of Virginia and the District of Columbia, that the Airports Authority create and appoint a Board of Review that has veto power over major Authority actions, and that consists entirely of Members of Congress.

The questions presented are:

1. Whether a challenge to the Board of Review's veto power is justiciable.
2. Whether the Board of Review is constitutional.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1990**

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**No. 90-906**

**METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
ET AL., PETITIONERS**

*v.*

**CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., ET AL.**

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 917 F.2d 48. The opinion of the district court (Pet. App. 29a-55a) is reported at 718 F. Supp. 974.

**JURISDICTION**

The judgment of the court of appeals was entered on October 26, 1990. The judgment was stayed by order of the court of appeals on December 6, 1990. Pet. App. 28a. This Court granted a petition for a writ of certiorari on January 14, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

## STATEMENT

1. Washington National Airport (National) and Washington Dulles International Airport (Dulles) are the only federally owned, major-air-carrier airports in the United States. From the time they were opened until 1987, both airports were operated by the federal government. For many years before 1987, the government had considered ceding its operational control of these airports. Pet. App. 2a.

In December 1984, a federal advisory commission report suggested a long-term lease arrangement between the federal government and an independent regional airports authority. Pet. App. 2a-3a. In response, both Virginia and the District of Columbia enacted legislation authorizing the creation of a regional airports authority capable of assuming the operation of the two airports. See 1985 Va. Acts ch. 598; District of Columbia Regional Airports Authority Act of 1985, 1985 D.C. Law 6-67, *reprinted at* Pet. App. 87a-106a, 119a-139a.

In 1986, Congress passed the Metropolitan Washington Airports Act of 1986 (the Airports Act), 49 U.S.C. App. 2451-2461, *reprinted at* Pet. App. 60a-85a, which authorizes the Secretary of Transportation to transfer operating authority over National and Dulles Airports to a local regional authority (referred to in the statute as "the Metropolitan Washington Airports Authority" and "the Airports Authority") under an extendable 50-year lease. 49 U.S.C. App. 2453(2), 2454(a), 2459. In its statutory findings, Congress recognized, among other things, that all other major-air-carrier airports in the United States are operated by state, regional, or local authorities; that the Executive Branch had recommended a transfer of authority to a "local/

State" entity; and that, in its view, control of National and Dulles Airports by a regional authority would facilitate timely improvements needed to meet growing demand. 49 U.S.C. App. 2451(4), (5) and (7).

Congress included several conditions on the authority of the Secretary of Transportation to enter into a lease of the two airports with the Airports Authority. 49 U.S.C. App. 2454(a)-(c), 2456. The Airports Authority must have powers granted to it by Virginia and the District of Columbia, but must be an independent political subdivision constituted solely to operate the local airports. 49 U.S.C. App. 2456(a) and (b). The Airports Authority must also have a governing Board of Directors composed of 11 members—five chosen by the Governor of Virginia, three chosen by the Mayor of the District of Columbia, two chosen by the Governor of Maryland, and one chosen by the President (49 U.S.C. App. 2456(e)); all but the Presidential appointee must reside in the District of Columbia metropolitan area. 49 U.S.C. App. 2456(e)(2)(C). The lease itself must require an annual payment equal to \$3 million in 1987 dollars to the United States Treasury by the Airports Authority. 49 U.S.C. App. 2454(b)(1).<sup>1</sup> The Airports Act also requires that, in order for the Secretary to have authority to enter into the lease with the Airports Authority, the Airports Authority must establish a Board of Review composed entirely of Members of Congress. The Board of Review is to be appointed by the Authority's Board of Directors from lists of Members of Congress serving on specified committees of the Senate and the House of Rep-

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<sup>1</sup> The \$3 million in 1987 dollars is "computed using the GNP Price Deflator." 49 U.S.C. App. 2454(b)(1).

representatives, and one Member at large from either body alternately. 49 U.S.C. App. 2456(f).<sup>2</sup> These lists are to be submitted to the Board of Directors by the Speaker of the House and the President *pro tempore* of the Senate. The members of the Board of Review are appointed and serve "in their individual capacities, as representatives of users of [National and Dulles]." 49 U.S.C. App. 2456(f)(1). Members of Congress from Virginia, Maryland, and the District of Columbia are disqualified from serving on the Board of Review. *Ibid.*

Under the statutory conditions for the lease, the Airports Authority must submit five types of actions to the Board of Review for possible veto: (1) adoption of the Authority's annual budget; (2) authorization for the issuance of bonds; (3) adoption, amendment, or repeal of regulations; (4) adoption or revision of any airport master plan; and (5) appointment of a chief executive officer. 49 U.S.C. App. 2456(f)(4)(B). These proposed actions may be implemented by the Airports Authority if not disapproved within 30 days by the Board of Review (or 60 days in the case of the annual budget). If the Board of Review disapproves an action, the action shall not take effect. 49 U.S.C. App. 2456(f)(4)(C) and (D). If the Board of Review is barred from carrying out its functions as a result of a judicial order, the Airports Authority lacks power to take

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<sup>2</sup> The Board of Review is to consist of nine members—two each from (1) the House Public Works and Transportation Committee; (2) the House Appropriations Committee; (3) the Senate Commerce, Science, and Transportation Committee; and (4) the Senate Appropriations Committee; and one at large from either body on an alternating basis. 49 U.S.C. App. 2456(f)(1).

any of the actions that it would otherwise be required to submit for review. 49 U.S.C. App. 2456(h).

Before passing the Airports Act, Congress consulted with the Department of Justice regarding the constitutional validity of several proposed bills. See J.A. 25-35. The Department analyzed various proposals and concluded that, although "the issue [was] not free from doubt," one proposed bill would "withstand constitutional scrutiny." J.A. 35. The version enacted by Congress and signed by the President closely resembles that bill.

2. In March 1987, the Secretary of Transportation signed a lease transferring control of the airports to the Airports Authority; the lease was also signed by the Chairman of the Airports Authority, the Governor of Virginia, and the Mayor of the District of Columbia, and took effect on June 7, 1987. Pet. App. 163a-189a. The lease provided for the operation of a Board of Review, as described in the Airports Act. *Id.* at 175a-178a.

Two days after the lease was signed, the Airports Authority adopted bylaws to govern its activities. Pet. App. 148a-162a. Article IV of the bylaws establishes a Board of Review and describes its powers and functions, which are consistent with the provisions in the Airports Act. *Id.* at 151a-154a.

In early April 1987, Virginia amended its prior legislation concerning the Airports Authority in several respects, including an amendment providing explicit power for the Authority to establish a Board of Review. See 1987 Va. Acts ch. 665, § 5.5, *reprinted at* Pet. App. 111a. In June 1987, the District of Columbia similarly amended its earlier legislation in several respects, and, in one of these amendments, also empowered the Airports Authority to establish a Board of Review. See District of Columbia Re-

gional Airports Authority Act of 1985 Amendment Act of 1987, D.C. Law 7-18, § 3(c)(2), reprinted at Pet. App. 143a.

By September 1987, the Airports Authority had created and appointed the Board of Review. Pet. App. 6a.

3. In March 1988, the Airports Authority submitted to the Board of Review a new Master Plan for National Airport. The Board of Review voted the following month not to disapprove it, and the Airports Authority has begun implementation of the Plan. The Master Plan provides for construction at National Airport which will, among other effects, make it possible for the airport to accommodate larger aircraft. The size of the terminals and parking facilities will also be significantly expanded. Pet. App. 6a, 36a, 41a.

4. In November 1988, respondents Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), and two individual members of CAAN filed this action against petitioners (the Airports Authority and the Board of Review). Respondents<sup>3</sup> alleged that the Master Plan was "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents further alleged that the Board of Review's power to disapprove Authority actions violates several constitutional provisions and the separation of powers doctrine. *Ibid.* They therefore sought a declaratory judgment that the Board of Review's authority "under 49 U.S.C.

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<sup>3</sup> Although the United States, which intervened in the court of appeals, is a respondent pursuant to Sup. Ct. Rule 12.4, references in this brief to respondents are to CAAN and the two individual plaintiffs.

§ 2456(f)(4)" is unconstitutional and void, and an injunction preventing the Board from exercising its review authority and taking any other actions under the Act; they also sought a declaratory judgment that the Airports Authority is forbidden to implement any actions required to be submitted to the Board, and an injunction preventing the Airports Authority from implementing the Master Plan for National Airport. J.A. 10.

5. In July 1989, the district court granted summary judgment to petitioners, upholding the validity of the Airports Authority structure. Pet. App. 55a.

The district court first ruled that this case is ripe, despite the fact that the Board of Review's veto authority had not been exercised with respect to the Master Plan. Pet. App. 37a-39a.<sup>4</sup> The court also concluded that respondents have standing because an increase in air traffic at National Airport could not occur without the improvements provided for by the Master Plan. *Id.* at 39a-42a. Alternatively, the court found standing because respondents' influence over decisions regarding National Airport has been diminished by the ban against local representation among the Members of Congress on the Board of Review. *Id.* at 42a-43a.<sup>5</sup>

Turning to the merits, the district court first rejected the contention that the Board of Review is

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<sup>4</sup> The Board of Review has exercised its veto power once, on an unrelated matter (a proposal concerning the Dulles Access Road). Pet. App. 38a; J.A. 83-84, 91-92.

<sup>5</sup> The court also rejected petitioners' claim that respondents should be required to exhaust their administrative remedies because respondents were participants in an ongoing study of noise problems being conducted by the Authority. Pet. App. 39a.

merely “an arm” or “an agent” of Congress. The court noted that the Airports Authority appoints the members of the Board of Review and can remove them; that the Board of Review members serve in their individual capacities as representatives of users of the airports (49 U.S.C. App. 2456(f)(1)); and that, in order for the Secretary to enter into a lease, the Airports Authority must be independent of the federal government as well as Virginia and the District of Columbia. It concluded that the Board of Review is therefore not an agent of Congress for federal separation of powers purposes. Pet. App. 46a-50a.

The district court further rejected the claim that the Board of Review was “mandated” by federal law. The court emphasized that both Virginia and the District of Columbia voluntarily created the Airports Authority and entered into the lease with the federal government. Pet. App. 50a-51a. Accordingly, the Board of Review “derives its existence from state law, not federal law.” *Ibid.* The court thus concluded that, in view of the state law character of the Airports Authority and its Board of Review, there is no conflict with constitutional requirements for federal offices and the exercise of federal power. *Id.* at 51a-54a.

6. Respondents appealed, and, pursuant to 28 U.S.C. 2403(a), the Attorney General intervened on behalf of the United States to defend the statutory scheme. A divided panel of the District of Columbia Circuit reversed the judgment of the district court and concluded that the Board of Review is unconstitutional.

The court first concluded that respondents’ claims are justiciable. Pet. App. 8a-9a. Finding that the

issue “warrant[s] little discussion,” it agreed that the case is ripe. *Id.* at 9a.<sup>6</sup> The court then determined that respondents’ allegations of injury from noise, air pollution, and risk of injury are “‘fairly traceable’” to the Master Plan, which would provide for a “significant increase in air traffic.” *Ibid.* The court thus found it unnecessary to address the district court’s alternative basis for standing. *Ibid.*

On the merits, the majority first rejected the argument that the Board of Review is not exercising federal power. The court emphasized that the authorizing statutes of Virginia and the District of Columbia do not spell out the powers and functions of the Board of Review in detail; instead, the federal Airports Act contains specific requirements concerning the Board. Pet. App. 10a-13a. The court concluded that the Board thus carries out “‘significant authority pursuant to the laws of the United States’” (Pet. App. 10a, quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)), because the federal statute defines the character of the Board of Review. Pet. App. 10a-11a.

Having determined that federal power is being exercised, the court of appeals held that the Board of Review is unconstitutional on general separation of powers grounds. It concluded that the members of the Board of Review are implementing executive functions and are subject to congressional control. Pet. App. 15a-19a. Contrary to the district court’s analysis, the court also emphasized that, in its view, Congress retains removal power over the members of the Board of Review because it can remove Members of Congress from the pertinent congressional commit-

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<sup>6</sup> The court also summarily agreed that respondents were not required to exhaust administrative remedies. Pet. App. 9a.

tees, thereby making them ineligible for continued service on the Board. *Id.* at 18a.<sup>7</sup>

Judge Mikva dissented. He questioned the court's characterization of the Board as a federal entity and concluded that "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." Pet. App. 22a. Judge Mikva then concluded that, even if the entity is exercising federal power, it is not unconstitutional. *Id.* at 22a-26a. Judge Mikva also disagreed with the majority's removal analysis. He concluded that the Airports Act should be read to vest removal authority over Board of Review members with the Airports Authority Board of Directors both because the appointment authority lies with the Airports Authority Board of Directors, and because statutes should be construed to avoid constitutional problems. *Id.* at 24a-26a.

#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case presents a novel and difficult issue—the validity of a federal lease condition, readily accepted by state authorities, requiring the appointment of Members of Congress to a state-created entity. Although we believe that such a condition would in most instances be unconstitutional, we conclude that it is permissible in the unusual circumstances at issue here.

1. The question of justiciability in this case raises issues of both standing and ripeness. Although these

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<sup>7</sup> Despite its holding, the court directed that "actions taken by the Board to this date not be invalidated automatically on the basis of our decision." Pet. App. 19a (citing *Buckley v. Valeo*, 424 U.S. at 142).

issues are not free from difficulty, we believe that respondents' claims are justiciable.

On the issue of standing, respondents claim that they suffer from various harmful effects of air and ground traffic at National Airport, that the Master Plan will aggravate these injuries by increasing traffic at National, and that invalidation of the Board of Review would remedy this injury by preventing implementation of the Master Plan. To some extent, respondents' claims of injury are speculative and attenuated because increased airport traffic is also dependent on decisions by other actors, including commercial airlines and the Federal Aviation Administration (FAA). Nevertheless, the Master Plan includes specific changes that will facilitate increases in the number of passengers and of flights, and respondents have therefore alleged a sufficient injury, which is traceable to the Master Plan and subject to judicial remedy.

On the issue of ripeness, we believe that this matter is ripe for judicial review even though the Board of Review did not veto the Master Plan and it is the veto authority that respondents have challenged. Precedents from this Court teach that, even when a power to remove or disapprove has not been exercised, the validity of such a provision may be ripe for judicial resolution if, as here, the very existence of the power has an immediate impact. In this case, moreover, the Board of Review completed its review procedure with respect to its decision not to veto the Master Plan, and nothing further remains to be done with respect to that procedure. Therefore, respondents' challenge to the Board of Review's authority is ripe.

2. With regard to the merits, it is clear that the Constitution does not prohibit Members of Congress

from holding state offices; the Framers explicitly considered such a prohibition and rejected it. 1 M. Farrand, *The Records of the Federal Convention of 1787* (1937 ed.) 20-21, 386-393, 428-429. But it is also clear that Members of Congress may not hold other federal offices, legislate without bicameralism and presentment to the President, or perform federal executive functions. *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

In the present case, appointment of the Board of Review, which would be permissible if undertaken by a State on its own, is made in response to a federal condition. The federal condition, which would be impermissible if it established a congressional board with veto power over a federal agency, involves not a federal agency but an agency created at the state level by a state entity (which would have the ability to make the appointments on its own).

In most instances, a condition of this kind—requiring a state or local entity to appoint Members of Congress to a state office as a condition of some federal aid or benefit—would violate separation of powers principles because it would pose a substantial threat of congressional aggrandizement and incursion on the Executive Branch. But we believe that, in the unusual circumstances of this case, no such threat exists. In the present case, Members of Congress have special and distinctive interests as individuals. Moreover, the case is one in which the Executive Branch has agreed with the Legislature on the permissibility of the organizational structure under which the airport property has been leased.

a. Contrary to the court of appeals' analysis, the Board of Review exercises state, and not federal, power. A conclusion that the authority is exercising federal power fails to give appropriate weight and

respect to the significance of the independent enactments by Virginia and the District of Columbia; it also raises questions concerning a wide variety of cooperative regimes in which state programs accord with specifications in federal statutes.

That the Board of Review is exercising state authority is necessary, but far from sufficient, to establish the validity of the condition. If existence of state authority were the only requirement, such conditions could be adopted by Congress in many circumstances in which the functions and responsibilities of the Executive Branch would be significantly impaired.

b. In addition to the state character of the challenged authority, this case presents an exceptional circumstance that obviates the threat of significant incursion on the Executive Branch or aggrandizement of legislative power. A rare, and in our view, essential element of the validity of the Board of Review arrangement here is that Members of Congress are not only designated to serve "in their individual capacities," but also do in fact have special and distinctive individual concerns that justify that designation. As a result of their responsibilities, and especially their need to travel to and from their legislative districts, Members of Congress are frequent and regular users of the two airports involved here.

c. The validity of the Board of Review is further supported by two additional circumstances present in this case. First, federal ownership and operation of major-air-carrier airports is an anomaly; all other such airports are operated at the state, regional, or local level. Second, the Executive and Legislative Branches have agreed on the formulation and implementation of the statutory condition of the airports' lease.

## ARGUMENT

### **I. THE CHALLENGE TO THE CONSTITUTIONALITY OF THE BOARD OF REVIEW IS JUSTICIALE**

Although the issues are not free from difficulty, we believe that respondents have standing and that their claims are ripe for judicial resolution.

#### **A. Respondents Have Standing**

To have standing, respondents must allege a sufficiently concrete and particularized injury, which is traceable to the challenged actions of petitioners and which can be remedied by the courts. See *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.*, 454 U.S. 464, 472 (1982).

Respondents' complaint alleges that they suffer from the activity level at National Airport, and that this activity causes noise, safety problems, and air pollution. J.A. 4-5; see also J.A. 85-86. An affidavit by a CAAN director further claims that CAAN members are "adversely affected by the traffic congestion resulting from passenger activity" at National, that some members have "developed health problems that they attribute to the air traffic," and that "others' property values have suffered as a result of their proximity to the airport or its flight path." J.A. 86.

Respondents' complaint alleges further harm from the Master Plan on the ground that it is "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents' motion for summary judgment states that their interest arises because "[t]he Air-

ports Authority's master plan proposes to expand National Airport facilities and passenger levels, which, in turn, will cause the noise and other airport problems to worsen." Pltf. Memo. Suppt. Mot. for Summary Judgment 16. The CAAN director's affidavit also maintains that injury will occur because the Master Plan "proposes to expand the airport's facilities, to build them to accommodate wide-bodied jets, to increase passenger levels, and to increase air carrier traffic by utilizing currently unused slots." J.A. 86.

To an extent, the claim of injury is speculative and attenuated because the Plan is a limited one and because increases in activity at National Airport are in part dependent on decisions by others. Although a new terminal is being built, the Master Plan preserves the existing number of aircraft gates. J.A. 89-90. The Plan improves surface traffic flow and parking, but does not change the length, number, or orientation of runways. J.A. 90. Moreover, the Airports Act as well as the lease between the Secretary of Transportation and the Airports Authority provides that the Airports Authority *cannot increase* the number of aircraft operations authorized by FAA regulations on October 18, 1986. See 49 U.S.C. App. 2454(c)(5)(C); Pet. App. 172a; J.A. 90. See also 49 U.S.C. App. 2458(e)(1). (FAA Administrator may not increase the number of takeoffs and landings from that authorized by FAA regulations on October 18, 1986). Furthermore, although some of the authorized flight slots are currently unused, commercial airlines must decide whether to schedule flights for currently unused slots. C.A. App. 170, 314. Finally, decisions on whether to use larger aircraft are also made by the commercial airlines and require FAA approval. J.A. 91.

Thus in some respects, respondents' asserted injuries resulting from the Master Plan are far from certain. This uncertainty places respondents' standing in question. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43-45 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-507 (1975).

Yet the Master Plan does call for changes that will facilitate increases in airport traffic. The Plan includes new aircraft gates capable of handling larger aircraft than before. Pet. App. 41a; J.A. 91. It also includes an additional taxiway turnoff to reduce aircraft time on the runway and thereby improve airport capacity. Pet. App. 41a; Pltf. Exh. 16 at 10. The Plan itself anticipates, and proposes changes that will foster, an increase in the number of flights and passengers. See Pet. App. 41a; C.A. App. 170, 314, 330; Pltf. Exh. 16 at 10.

Since respondents' claims of injury from increased traffic at National Airport are in part attributable to the Master Plan, it appears to us that respondents have asserted a sufficiently concrete and personalized injury, traceable to the actions of petitioners. And since the Master Plan could not have been adopted and cannot be implemented without the Board of Review, respondents' injury can be remedied by the relief they seek.<sup>8</sup>

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<sup>8</sup> See 49 U.S.C. App. 2456(h) (if Board of Review is unable to carry out functions by reason of a judicial order, Airports Authority shall have no authority to perform any of the acts required to be submitted to the Board of Review); Pet. App. 154a (Airports Authority bylaws provision to same effect); *id.* at 178a (lease provision to same effect).

#### B. Respondents' Claim Is Ripe

Ripeness has two dimensions. First, a claim must be sufficiently ripe to meet Article III case or controversy requirements. Second, the ripeness doctrine is also premised on prudential considerations. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). In this case, we believe that the Article III requirements have been met because there is a real conflict between the parties, and the action taken by the petitioners assertedly causing harm to the respondents (the decision not to veto the Master Plan) has already occurred. Thus, the ripeness concerns here are prudential in nature. Although the Board of Review did not exercise its veto authority with respect to the Master Plan, we conclude that respondents' challenge to that authority is nevertheless ripe.

As this Court made clear in *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986), the fact that a mechanism for controlling official conduct is not exercised does not necessarily render unripe a dispute regarding that mechanism. *Bowsher* involved a contention that the Comptroller General may not be authorized to carry out executive functions because he is an agent of Congress, and that his status as an agent of Congress was shown in part by a statutory provision making him removable by that body. A question of ripeness was raised, however, because that power of removal had never been exercised (or even threatened). This Court found the case ripe for review because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." 478 U.S. at 727 n.5 (internal quotation marks

omitted). Thus, the very existence of the removal mechanism was held sufficient to affect the role of the Comptroller General.

Although the threat of removal of an official is not identical to the threat of disapproval of his actions, the logic of *Bowsher* is applicable here. The Board of Review's veto power undoubtedly has an impact on the Airports Authority, whether the power is exercised or not, as the Authority contemplates formulation of the proposals that must be considered by the Board.

Similarly, in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), this Court reached the merits of the severability of a legislative veto provision that had never been used. That provision had not been used because the controversy arose after such devices had been invalidated in *INS v. Chadha*, 462 U.S. 919 (1983). Although this Court found it unnecessary to discuss the question of ripeness, the court of appeals had considered the issue and concluded that the matter was ripe. See *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985).<sup>9</sup>

Additionally, the Third Circuit found the controversy ripe for review in *Ameron, Inc. v. U.S. Army Corps of Engineers*, 809 F.2d 979, 986-988 (1986), cert. granted, 485 U.S. 958, cert. dismissed, 488 U.S. 918 (1988), in circumstances closely analogous to those here. In *Ameron*, the court reached the merits of a challenge to the Comptroller General's statutory authority to extend the length of an auto-

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<sup>9</sup> See also *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984). But see *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984).

matic stay of contract implementation by the government following a protest of the award of the contract. The Comptroller General had not exercised the challenged authority; the court nevertheless held the controversy ripe because the Comptroller General's ability to exercise the power was found to have an actual impact on the contracting process.

We also note, however, that in *Clark v. Valeo*, 431 U.S. 950 (1977), this Court summarily affirmed a decision of the D.C. Circuit, which had found that a challenge to a congressional veto provision was not ripe for review because the veto provision had not been used. *Clark v. Valeo*, 559 F.2d 642, 649 (*in banc*). But in *Clark*, the court of appeals went on to point out that the challenge to the legislative veto mechanism arose before Congress's period to exercise its veto power had expired, and Congress had adjourned without acting. In contrast, in this case, Board of Review consideration of the Master Plan, as proposed by the Airports Authority, has been completed.

Thus, we believe the challenge to the Board of Review's veto power is ripe for judicial determination. The analysis set out in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967), supports this conclusion. That analysis focuses on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149.<sup>10</sup> The issue here is "fit for judicial decision" because, in addition to the "here-and-now subservi-

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<sup>10</sup> Although *Abbott Laboratories* arose in an administrative law context, it remains the "leading discussion of the doctrine" of ripeness. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

ence" analysis suggested by *Bowsher*, the Board of Review has taken all necessary steps regarding approval of the Master Plan. The review process is therefore final, making the case concrete. See *Abbott Laboratories*, 387 U.S. at 148-149.

Furthermore, as a result of the imminent implementation of the Master Plan, respondents are threatened with the injuries they allege unless they prevail in this challenge. Thus, we believe the *Abbott Laboratories* standards have been met.

## **II. THE STATUTORY LEASE CONDITION REQUIRING THE APPOINTMENT OF MEMBERS OF CONGRESS IS CONSTITUTIONAL IN THE UNUSUAL CIRCUMSTANCES OF THIS CASE**

Respondents challenge the validity of the Board of Review, claiming that it violates the constitutional separation of powers, as well as the bicameralism requirement (Art. I, §§ 1 and 7), and the Presentment Clauses (Art. I, § 7, Cls. 2, 3). J.A. 10. Respondents also argued below, though they did not allege in their complaint, that service on the Board of Review by Members of Congress is inconsistent with the Appointments Clause (Art. II, § 2, Cl. 2), and the Incompatibility and Ineligibility Clauses (Art. I, § 6, Cl. 2). Pet. App. 19a, 53a-54a.

We agree with respondents that separation of powers principles, as well as the bicameralism and presentment requirements, sharply restrict the manner in which Congress or its agents may act within our constitutional system. Nevertheless, we believe that the Board of Review's authority is constitutional in the special, limited context of this case.

It is clear that a State may, consistently with the Constitution, appoint Members of Congress to state

offices. It is also clear that Members of Congress are precluded by specific provisions of the Constitution from serving on a federal Board of Review that has veto power over the actions of a federal agency or that otherwise exercises federal governmental authority. In the present case, the Airports Authority's Board of Review is created and appointed by the Airports Authority, which is a creature of state and local law, but the federal Airports Act itself specifies that such a Board is a condition for the federal lease.

Although such an arrangement does not violate any specific constitutional prohibition, we believe that, in most circumstances, such a statutory condition would be unconstitutional because it would pose a threat of congressional aggrandizement and of significant intrusion on the functions and responsibilities of the federal Executive Branch. Because of a highly unusual combination of circumstances, however, we conclude that the statutory lease condition at issue here does not pose such a threat and is permissible.

### **A. States May Appoint Members Of Congress To State Offices**

It is undisputed that States may appoint Members of Congress to state offices. Indeed, the Framers specifically considered whether to prohibit Members of Congress from holding state offices, and explicitly decided against such a limitation. Thus, if a State, acting entirely on its own and without federal inducement, appointed Members of Congress to a state Airports Authority, the appointments would be constitutional.

As ratified, the Constitution contains an Incompatibility Clause that bars Members of Congress from

simultaneously holding federal office,<sup>11</sup> and an Ineligibility Clause that prohibits Members of Congress from being appointed to federal offices that were created, or for which the “Emoluments” were increased, during their congressional tenure.<sup>12</sup> Neither Clause prohibits Members of Congress from holding state office.

Introduced at the Constitutional Convention by Edmund Randolph as part of “the Virginia Plan,” these provisions originally did include a prohibition against holding state office. See 1 M. Farrand, *The Records of the Federal Convention of 1787* (1966 ed.) 20-21. See generally *Signorelli v. Evans*, 637 F.2d 853, 859-862 (2d Cir. 1980). While there was considerable discussion of the aspects of Randolph’s proposal prohibiting Members of Congress from holding federal offices, the Framers decisively rejected the prohibition of simultaneous state appointments. Charles Pinckney moved to strike it, and Roger Sherman seconded this proposal, explaining: “It [would] seem that we are erecting a Kingdom at war with itself. The Legislature ought not to be fettered in such a case.” 1 M. Farrand, *supra*, at 386. The proposed state office ineligibility provision for Members of the House of Representatives was then defeated by an 8 to 3 vote (*ibid.*), and James Wilson commented: “By

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<sup>11</sup> The Incompatibility Clause provides: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” Art. I, § 6, Cl. 2.

<sup>12</sup> The Ineligibility Clause provides: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.” Art. I, § 6, Cl. 2.

the last vote it appears that the convention have no apprehension of danger of state appointments.” *Id.* at 393.<sup>13</sup>

Three days later, a similar proposed state office ineligibility provision for Senators was also rejected, with Pinckney urging that “the States ought not to be barred from the opportunity of calling members of [the Senate] into offices at home. Such a restriction would also discourage the ablest men from going into the Senate.” 1 M. Farrand, *supra*, at 428-429. See also 1 W. Benton, *1787: Drafting the United States Constitution* 711, 722, 726-727 (1986).

During the ratification debates, James Madison confirmed the rejection of a prohibition against Members of Congress serving in state offices. In *The Federalist*, No. 56, he defended the proposed House of Representatives against an attack that it would be too small to have adequate knowledge of the interests of its constituents by noting, among other points, that, “[t]he representatives of each State \* \* \* will probably in all cases have been members, and may even at the very time be members, of the State legislature \* \* \*.” *The Federalist Papers* 348 (C. Rossiter ed. 1961).

Thus, the text and history of the Constitution make clear that States may appoint Members of Congress to hold state offices. Indeed, the practice of appointing Members of Congress to state positions has continued into modern times.<sup>14</sup>

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<sup>13</sup> A previous motion to strike the state ineligibility provision had failed on a 5-4 vote. See 1 M. Farrand, *supra*, at 217; *Signorelli*, 637 F.2d at 861 n.8.

<sup>14</sup> For example, selected Members of Congress serve on the Board of Directors of the Massachusetts Centers of Excellence. See Def. Exh. 9.

**B. Members of Congress May Not Hold Other Federal Offices, Exercise Federal Executive Functions, Or Legislate Without Bicameralism And Presentment**

In contrast, separation of powers principles sharply constrain the role of Congress and its Members at the federal level. As discussed, under the Ineligibility and Incompatibility Clauses, Members of Congress may not hold other “Office[s] under the United States” simultaneously with congressional office; nor may they be appointed to a “civil Office under the Authority of the United States,” which was created or for which “Emoluments” were increased during their congressional tenure. See notes 11 & 12, *supra*. These limitations themselves reflect an important separation of powers principle. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

More fundamentally, Congress may not exercise the functions of the Executive Branch. “The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). Thus, federal executive functions may not be entrusted to an individual over whom Congress retains removal power. *Bowsher*, 478 U.S. at 726-727. The consequences of such an arrangement would be that “Congress in effect \* \* \* retain[s] control over the execution of the Act and \* \* \* intrude[s] into the executive function. The Constitution does not permit such intrusion.” *Id.* at 734. Instead, “once Congress makes its choice in enacting legislation, its participation ends.” *Id.* at 733. Although Congress has “abundant means to oversee and control its admin-

istrative creatures,” including “durational limits on authorizations and formal reporting requirements” (*Chadha*, 462 U.S. at 955 n.19), Congress may not itself execute the law. *Id.* at 955; see also *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928); *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

In exercising its legislative power, moreover, Congress must observe the requirements of bicameralism (Art. I, § 1 and § 7, Cl. 2) and presentment to the President (Art. I, § 7, Cls. 2, 3). These requirements are “integral parts of the constitutional design for the separation of powers.” *Chadha*, 462 U.S. at 946. Thus, Congress “may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress.” *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring in the judgment). For “[i]f Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade ‘the carefully crafted restraints spelled out in the Constitution.’” *Id.* at 755, quoting *Chadha*, 462 U.S. at 959.

As a result, just as it is clear that a State, acting entirely on its own volition, may appoint Members of Congress to a Board of Review, so too it is equally clear that, at the federal level, Congress may not require the appointment of its Members to a Board of Review that holds veto power over the actions of a federal agency or that otherwise exercises federal governmental power. In addition to possible Incompatibility and Ineligibility Clause problems, such a requirement would violate fundamental separation of powers principles because Congress would, through

its Members, be exercising federal executive functions. See *Bowsher*, 478 U.S. at 732-734. Moreover, to the extent that the Members' actions in such a context were viewed as legislative, those actions would also be impermissible because they would be undertaken without bicameralism or presentment. *Chadha*, 462 U.S. at 951-959.

**C. Although A Federal Condition That States Appoint Members Of Congress Would Be Impermissible In Most Circumstances, The Condition Is Not Unconstitutional In The Limited Circumstances Of This Case**

In our view, a federally imposed condition on a grant or authorization to the States—that States appoint Members of Congress to state offices and thereby exercise state authority—would be unconstitutional in most circumstances. The reason is not that such a requirement would violate the Incompatibility and Ineligibility Clauses; by their terms, those Clauses apply only to offices of the United States. For a similar reason, such a requirement would not violate the requirements of bicameralism and presentment—discharge of the duties of a state office is not an exercise of federal legislative power. Instead, such a condition would, in most circumstances, be unconstitutional because it would allow Members of Congress to evade the “carefully crafted restraints” of the Constitution (*Chadha*, 462 U.S. at 959)—to act in an extra-legislative capacity after enacting a statute, and thereby to threaten the Executive Branch’s exclusive responsibility for federal executive functions. Although we believe that a conclusion of unconstitutionality will attend such a condition in most instances, we believe that, in the unusual circumstances of this case, such a conclusion is not warranted.

1. At the outset, we emphasize that the powers of the Airports Authority—and of the Board of Review—derive from state authority. This is a necessary, but far from sufficient, condition for constitutionality.<sup>15</sup> Both Virginia and the District of Columbia have enacted valid statutes authorizing the operations of the Airports Authority and the Board of Review, and, indeed, without those statutes, the Authority and the Board could neither exist nor function. This exercise of sovereign power by Virginia and by the District has an independent stature and should not be minimized. We strongly disagree with the court of appeals’ conclusion that the Airports Authority’s Board of Review is exercising federal authority. In our view, the court of appeals’ analysis unjustifiably denigrates the significance of the independent enactments by Virginia and the District. The state and local governments are neither ciphers nor parrots of the federal government; their legislative enact-

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<sup>15</sup> In *Springer v. Philippine Islands*, *supra*, this Court held, on separation of powers grounds, that the Philippines legislature could not participate in management of government corporations even if the management were viewed as a proprietary act (277 U.S. at 203); the Court also expressed skepticism about whether Congress could similarly participate in the management of a government corporation on a proprietary rationale (*id.* at 204-205). In that context, however, the Court was considering the activities of the legislative branches (Congress and the Philippines legislature) vis-a-vis the Executive Branch at the same level of government—in other words, the congressional aggrandizement model outlined at pages 24-26, *supra*. That analysis does not directly address the permissibility of such a condition operating at a different level of government (as in this case), and, especially, at a different level of government that clearly has the power to make the challenged appointments on its own.

ments are entitled to weight and respect in evaluating the character of their creations.<sup>16</sup>

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<sup>16</sup> Two complications concerning the state and local character of the Authority should be noted. First, a question arises whether the Airports Authority should be viewed as a creature of state law, since one of its parents is the District of Columbia. The District of Columbia, of course, is not a State under the Constitution. See, e.g., *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-453 (1805). Nevertheless, particularly because the District of Columbia currently acts under "home rule" authority (see District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973)), the power that it delegated to the Authority is best seen as comparable to state or local power for purposes of these federal constitutional restrictions. Cf. *Key v. Doyle*, 434 U.S. 59, 68 n.13 (1977) (D.C. Code "is a comprehensive set of laws equivalent to those enacted by state and local governments"); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953) (upholding delegation of lawmaking authority to District and analogizing authority conferred to "the police power of a state"); *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1, 7-9 (1889) (holding that, under applicable statutes, District is a municipal corporation rather than a department of the United States government); *Hobson v. Hansen*, 265 F. Supp. 902, 919-920 (D.D.C. 1967) (three-judge court) (Wright, J., dissenting) (noting that District of Columbia officials are not considered officers of the United States for purposes of the Appointments Clause). Furthermore, the Authority is not simply a creature of the District, but, in very substantial part, a creature of the Commonwealth of Virginia as well.

A second complication is suggested by the holding of this Court that congressional approval of a compact among States converts those States' agreements into "federal law" for purposes of interpreting the compact. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). But that principle does not alter the fact that the Airports Authority draws its power from state authority, and is thus itself exercising state power. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,

This state character of the Airports Authority bears emphasis. The federal Airports Act itself does not create the Board of Review, just as it does not create the Airports Authority. The federal legislation provides authority for the Secretary of Transportation to enter into a long-term lease arrangement with an Airports Authority established by Virginia and the District of Columbia. The Airports Authority itself was created by legislative acts of Virginia and the District of Columbia, and it is wholly independent of the federal government. See Pet. App. 87a-118a (Virginia legislation); *id.* at 119a-147a (District of Columbia legislation); 49 U.S.C. App. 2456(b)(1). And those jurisdictions amended their previously passed ordinances in order expressly to empower the Airports Authority—which they alone had created—to establish a Board of Review. Pet. App. 111a, 143a. The powers of that Board, in turn, are defined in the Airports Authority's bylaws. *Id.* at 151a-154a. In short, the Airports Authority is clearly created—and the Board of Review is authorized to act—by the enactments of Virginia and the District of Columbia, rather than by the Airports Act.<sup>17</sup>

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440 U.S. 391, 398-400 (1979) (For purposes of 42 U.S.C. 1983, acts of a regional entity created by an interstate compact are under color of state law rather than pursuant to federal law); *Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Co.*, 786 F.2d 1359, 1365 (9th Cir. 1986) (Members of a council implementing an interstate compact need not be appointed pursuant to the Appointments Clause; although congressional consent gives an interstate compact "some attributes of federal law," the "states ultimately empower the Council members to carry out their duties"), cert. denied, 479 U.S. 1059 (1987).

<sup>17</sup> Because the Airports Authority and the Board of Review are creatures of state and local law, respondents' Appoint-

The court of appeals' analysis—that the Board of Review is exercising federal authority—also has the potential to create serious problems in a wide range of instances unrelated to this case. As noted, the court concluded that the Board wields federal power because the nature of the Board is spelled out in the Airports Act; as a result, the court concluded, the Board is “‘exercising significant authority pursuant to the laws of the United States.’” Pet. App. 10a. But the fact that a federal statute enumerates requirements, which are then the basis of state or local action, does not transform the state action into federal action. We note that there are numerous federal grant and regulatory programs that operate on a cooperative federalism model and in which state plans must conform to federal requirements. See, e.g., *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2513 (1990) (Medicaid); *International Paper Co v. Ouellette*, 479 U.S. 481, 489-490 (1987) (Clean Water Act). Yet it has never been suggested that, in such circumstances, all constitutional provisions governing the federal government's exercise of power (including the Appointments Clause) apply to the state government's implementation of such plans. (Indeed, pursuant to the court of appeals' decision, the Airports Authority itself—not simply the Board of Review—may be “‘exercising significant authority pursuant to the laws of the United States.’”) Under the court of appeals' analysis, significant new questions about the structure and operation of these programs would be raised; the court's analysis of fed-

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ments, Ineligibility, and Incompatibility Clause objections are unavailing; those provisions relate to offices or officers “of the United States” and “under the United States.” See Art. I, § 6, Cl. 2; Art. II, § 2, Cl. 2. See also Pet. App. 53a-54a.

eral authority fails to appreciate the independent validity of the state and local statutes, and should be rejected.<sup>18</sup>

Although the issue is placed in proper perspective by recognizing that the Airports Authority operates pursuant to state law, such recognition serves only to focus the issue, not to resolve it. If the exercise of state authority were sufficient in itself to validate a statutorily imposed condition like the one in this case, a massive loophole in the separation of powers requirement would be opened. For instance, many

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<sup>18</sup> Although the existence of congressional power to remove members of the Board of Review might well serve to invalidate the statute, we disagree with the court of appeals' conclusion that the members of the Board of Review are removable by Congress. Pet. App. 18a. The Virginia and District statutes, the Airports Authority bylaws, the Airports Act, and the lease are all silent on the subject of removal; under long-settled principles, if there is silence on removal, the appointing authority retains removal authority. See *Myers v. United States*, 272 U.S. 52, 119 (1926); *Carlucci v. Doe*, 488 U.S. 93, 99 (1988). The Airports Authority's resolutions appointing members of the Board of Review, moreover, explicitly state that “[t]he terms of each of these appointments are as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of this term.” J.A. 58 (emphasis added); see also J.A. 47. Although the court of appeals rested its conclusion on the fact that Congress could remove a member of the Board of Review from a congressional committee and therefore remove him from the Board of Review, it is more consistent with general principles of removal authority—and with the Airports Authority's own interpretation of its bylaws and authority—to conclude that the Authority retains removal power, and that this power is exclusive. The provisions of the Airports Act relating to membership on the Board of Review, 49 U.S.C. App. 2456(f), are addressed to appointment, not to continuing membership or removal.

areas in which the Executive Branch plays an important role in administering cooperative programs with the States could be changed to a structure in which States would be given funds only if they appoint Members of Congress to state offices with veto power over the expenditure of those funds. Federal assistance to state programs for roads, schools, housing, and health care each could be made dependent on state appointment of Members of Congress with veto or other power over major actions, while at the same time leaving no role for the federal Departments of Transportation, Education, Housing and Urban Development, or Health and Human Services. Thus, while the exercise of state authority is essential to the validity of the Board of Review, it represents only the first step in the analysis.<sup>19</sup>

2. An additional, and in our view, essential element present in this case is that, unlike most in-

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<sup>19</sup> A related point is the fact that the state and local enactments authorizing the appointment of the Board of Review—and the actions of the Authority and the state and local governments in agreeing to the lease—were entirely uncoerced. But this fact also is a necessary, but not sufficient, condition for validity.

This Court recently reiterated, in considering a condition in a spending program, that, absent undue coercion, a State may protect itself by refusing to accept a federal proposal containing a condition that the State does not like. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-590 (1937). In such a situation, the principal concern is federalism-related, and the self-protection rationale for States has considerable force. But this logic falters when applied to a situation involving separation of powers concerns. Although the States themselves provide their own defense against unwanted federal encroachment, they have no institutional concern in protecting the federal Executive Branch from an incursion by Congress.

stances in which congressional participation might be made a legislative condition, there is here a reasonable basis for the appointment of Members of Congress “in their individual capacities, as representatives of users of [the airports].” 49 U.S.C. App. 2456(a)(1), reprinted at Pet. App. 75a. See also Pet. App. 151a (Airports Authority bylaws); *id.* at 175a (lease). Indeed, Members of Congress have a special and distinctive relationship with these airports. This relationship was stressed by Secretary of Transportation Dole in her testimony to Congress as it considered the Airports Act; she noted that “Members of Congress are heavy users of the air transportation system” and that congressional service requires “many trips back to [congressional] districts.” *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986).

As individuals, Members of Congress whose districts are not near the seat of government, and who must frequently commute between the capital and their constituencies, are especially heavy users of National and Dulles airports. (And Members from Virginia, the District of Columbia, and Maryland—who are the least likely to be frequent users—are specifically excluded from the Board of Review. See 49 U.S.C. App. 2456(f)(1).) Thus, these individuals are well suited to represent the interests of all travelers who use these airports.

To be sure, Members of Congress are also users (or potential users) of roads, schools, hospitals, social security, and a myriad of other federally supported programs, but their use of these airports is qualitatively different. At most, Members of Congress are users of these other programs *to the same extent as*

other citizens. Here, in contrast, Members of Congress are individual users of the two Washington-area airports to a far greater degree than most other citizens, and in view of the necessities of their office (involving frequent trips to and from their home districts), this characteristic is predictable and inevitable.

Members of Congress have a special responsibility to travel to and from their districts in order to attend to their legislative duties and at the same time to keep in close touch with the people they represent, and this responsibility underscores their concern with the quality of service afforded by the area's airports. Indeed, the importance of travel to and from legislative sessions is recognized by the Constitution itself, which provides (in Art. I, § 6, Cl. 1) that in the course of such travel, Members shall "in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest."

Furthermore, there is clearly a legitimate interest in guarding against excessive parochialism in favor of local residents at the airports serving the thousands of people who travel to the national capital to visit, to see the national government, and to conduct business; there would, presumably, be no constitutional objection to a non-congressional Board of Review composed of citizen representatives of airport users. Because Members of Congress are frequent individual users of the airports, it is not implausible for them to fulfill that role in this limited context.<sup>20</sup>

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<sup>20</sup> As the district court points out, the legislative history contains references to the maintenance of congressional control, sometimes in stark terms. See Pet. App. 49a n.19. As the district court also points out, however, these statements must be seen in perspective, as particular statements in a floor

3. The constitutional validity of the Board of Review is, in our view, further supported by the presence in this case of two additional circumstances: the anomaly of federal operation of major-air-carrier airports, and the agreement of the Executive and Legislative Branches on the organizational structure under which the airport property has been leased.

a. The particular setting of this case—ownership and operation of major-air-carrier airports—is one in which a federal role itself is an anomaly, and the Airports Act explicitly recognizes this anomaly. See 49 U.S.C. App. 2451(5), reprinted at Pet. App. 60a; see also Pet. App. 2a. All other major-air-carrier airports in the nation are operated at the state, regional, or local level. As a result, this setting dif-

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debate and as part of a legislative history that also includes references to the Members of Congress as individual users and as representatives of users. *Id.* at 49a-50a. Particular remarks in the course of a floor debate should not be the basis for invalidating a statute. Unlike language in the statute itself, they do not affect the structural arrangements created by the law, nor do they control the responsibilities and obligations of those implementing the law.

The specification of committee membership for eight of the nine members of the Board of Review may also be seen to undermine the contention that they are appointed as individuals, since the criterion of committee membership is related to congressional duties, rather than to individual use of the airports. Although this aspect of the statutory lease condition is troubling (and was not part of the proposed statute presented to the Justice Department for review, see J.A. 34-35), we do not believe that this requirement of committee membership is sufficient to undermine the individual user rationale. If that rationale is otherwise valid, it is not invalidated by the fact that the Board is largely limited to Members with the greatest transportation expertise.

fers significantly from those in which there is a generally established federal presence.<sup>21</sup>

It might be objected that, just as other States and localities have the authority to own and operate airports without appointing a Board of Review, so too Virginia and the District of Columbia should have that ability. But that objection relates to the federalism concern (whether the condition is an undue invasion of state and local power) rather than the separation of powers concern (whether the condition is an incursion on the Executive Branch). Since the question here is one of separation of powers, the anomaly of any federal role militates against a conclusion that a threat to executive powers is presented by the limited circumstances of the condition under review.<sup>22</sup>

b. Finally, the conclusion that there is no threat of incursion on the Executive Branch is supported by the absence of any conflict between the political branches. Both the Executive and Leg-

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<sup>21</sup> In contrast, the regulation of civil aviation has, of course, long been, and remains, a vital federal responsibility. See, e.g., 49 U.S.C. 106 (responsibilities of the FAA). The federal role in the regulation of civil aviation is unaffected by the Airports Act.

<sup>22</sup> See also *Transfer of National and Dulles Airports, Hearings on S. 1017 and S. 1110 Before The Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 41 (1986) (statement of Secretary Dole) ("Almost since they opened, there has been general agreement that National and Dulles should not be operated as conventional Federal agencies."); 132 Cong. Rec. 32,138 (1986) (Rep. Gingrich) ("[M]anaging legitimately Federal activities is a big enough job. It is time to allow a regional authority to do a regional job, that of managing airports.").

islative Branches believe that the Airports Act arrangement is valid. To be sure, the agreement between the Executive and Congress is not dispositive: "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." *Chadha*, 462 U.S. at 942 n.13. But this Court has stressed that, in such circumstances, the courts are to be at their most deferential. See *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). See also *Mistretta v. United States*, 488 U.S. 361, 384 (1989).

In this case, Congress expressly raised a question with the Executive Branch regarding the constitutionality of the proposed airports legislation, and the Department of Justice responded that it believed the statute would withstand constitutional scrutiny. See J.A. 25-35. Since this is a separation of powers matter in which the two branches directly affected by the legislation have carefully considered the issue and found the statute valid, the Court should be hesitant to strike it down. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (deference to judgment of Congress is "certainly appropriate" when that body has specifically considered the question of the statute's constitutionality). See also *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."). Furthermore, the Executive Branch, in the person of the Secretary of Transportation, made an independent decision to sign the lease with the Airports Authority (Pet. App. 186a); the Airports Act authorized, but did not require, the Secretary to enter into such a

lease. See 49 U.S.C. App. 2454(a), reprinted at Pet. App. 64a.

\* \* \* \*

We have often argued before this Court the need to vindicate and preserve separation of powers principles. In most circumstances, a congressional condition like the one at issue here would collide with those principles because it would threaten a significant incursion on the Executive Branch. But, given the prerequisites of state authority and lack of coercion, and of the special and distinctive interests of Members of Congress as individuals—combined with the anomaly of a federal role in operating major-air-carrier airports and the specific Executive assent to the challenged provision—service by Members of Congress on the Airports Authority's Board of Review does not violate the Constitution.

#### **CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1991

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\* The Solicitor General is disqualified in this case.

MARCH 1 1991

No. 90-906

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,  
ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., ET AL.

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE UNITED STATES

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#### **QUESTIONS PRESENTED**

The Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451 *et seq.*) requires, as a condition of leasing federally owned airports to a regional Airports Authority established by the Commonwealth of Virginia and the District of Columbia, that the Airports Authority create and appoint a Board of Review that has veto power over major Authority actions, and that consists entirely of Members of Congress.

The questions presented are:

1. Whether a challenge to the Board of Review's veto power is justiciable.
2. Whether the Board of Review is constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 917 F.2d 48. The opinion of the district court (Pet. App. 29a-55a) is reported at 718 F. Supp. 974.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1990. The judgment was stayed by order of the court of appeals on December 6, 1990. Pet. App. 28a. This Court granted a petition for a writ of certiorari on January 14, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

1. Washington National Airport (National) and Washington Dulles International Airport (Dulles) are the only federally owned, major-air-carrier airports in the United States. From the time they were opened until 1987, both airports were operated by the federal government. For many years before 1987, the government had considered ceding its operational control of these airports. Pet. App. 2a.

In December 1984, a federal advisory commission report suggested a long-term lease arrangement between the federal government and an independent regional airports authority. Pet. App. 2a-3a. In response, both Virginia and the District of Columbia enacted legislation authorizing the creation of a regional airports authority capable of assuming the operation of the two airports. See 1985 Va. Acts ch. 598; District of Columbia Regional Airports Authority Act of 1985, 1985 D.C. Law 6-67, *reprinted at* Pet. App. 87a-106a, 119a-139a.

In 1986, Congress passed the Metropolitan Washington Airports Act of 1986 (the Airports Act), 49 U.S.C. App. 2451-2461, *reprinted at* Pet. App. 60a-85a, which authorizes the Secretary of Transportation to transfer operating authority over National and Dulles Airports to a local regional authority (referred to in the statute as "the Metropolitan Washington Airports Authority" and "the Airports Authority") under an extendable 50-year lease. 49 U.S.C. App. 2453(2), 2454(a), 2459. In its statutory findings, Congress recognized, among other things, that all other major-air-carrier airports in the United States are operated by state, regional, or local authorities; that the Executive Branch had recommended a transfer of authority to a "local

State" entity; and that, in its view, control of National and Dulles Airports by a regional authority would facilitate timely improvements needed to meet growing demand. 49 U.S.C. App. 2451(4), (5) and (7).

Congress included several conditions on the authority of the Secretary of Transportation to enter into a lease of the two airports with the Airports Authority. 49 U.S.C. App. 2454(a)-(c), 2456. The Airports Authority must have powers granted to it by Virginia and the District of Columbia, but must be an independent political subdivision constituted solely to operate the local airports. 49 U.S.C. App. 2456(a) and (b). The Airports Authority must also have a governing Board of Directors composed of 11 members—five chosen by the Governor of Virginia, three chosen by the Mayor of the District of Columbia, two chosen by the Governor of Maryland, and one chosen by the President (49 U.S.C. App. 2456(e)); all but the Presidential appointee must reside in the District of Columbia metropolitan area. 49 U.S.C. App. 2456(e)(2)(C). The lease itself must require an annual payment equal to \$3 million in 1987 dollars to the United States Treasury by the Airports Authority. 49 U.S.C. App. 2454(b)(1).<sup>1</sup> The Airports Act also requires that, in order for the Secretary to have authority to enter into the lease with the Airports Authority, the Airports Authority must establish a Board of Review composed entirely of Members of Congress. The Board of Review is to be appointed by the Authority's Board of Directors from lists of Members of Congress serving on specified committees of the Senate and the House of Rep-

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<sup>1</sup> The \$3 million in 1987 dollars is "computed using the GNP Price Deflator." 49 U.S.C. App. 2454(b)(1).

representatives, and one Member at large from either body alternately. 49 U.S.C. App. 2456(f).<sup>2</sup> These lists are to be submitted to the Board of Directors by the Speaker of the House and the President *pro tempore* of the Senate. The members of the Board of Review are appointed and serve “in their individual capacities, as representatives of users of [National and Dulles].” 49 U.S.C. App. 2456(f)(1). Members of Congress from Virginia, Maryland, and the District of Columbia are disqualified from serving on the Board of Review. *Ibid.*

Under the statutory conditions for the lease, the Airports Authority must submit five types of actions to the Board of Review for possible veto: (1) adoption of the Authority’s annual budget; (2) authorization for the issuance of bonds; (3) adoption, amendment, or repeal of regulations; (4) adoption or revision of any airport master plan; and (5) appointment of a chief executive officer. 49 U.S.C. App. 2456(f)(4)(B). These proposed actions may be implemented by the Airports Authority if not disapproved within 30 days by the Board of Review (or 60 days in the case of the annual budget). If the Board of Review disapproves an action, the action shall not take effect. 49 U.S.C. App. 2456(f)(4)(C) and (D). If the Board of Review is barred from carrying out its functions as a result of a judicial order, the Airports Authority lacks power to take

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<sup>2</sup> The Board of Review is to consist of nine members—two each from (1) the House Public Works and Transportation Committee; (2) the House Appropriations Committee; (3) the Senate Commerce, Science, and Transportation Committee; and (4) the Senate Appropriations Committee; and one at large from either body on an alternating basis. 49 U.S.C. App. 2456(f)(1).

any of the actions that it would otherwise be required to submit for review. 49 U.S.C. App. 2456(h).

Before passing the Airports Act, Congress consulted with the Department of Justice regarding the constitutional validity of several proposed bills. See J.A. 25-35. The Department analyzed various proposals and concluded that, although “the issue [was] not free from doubt,” one proposed bill would “withstand constitutional scrutiny.” J.A. 35. The version enacted by Congress and signed by the President closely resembles that bill.

2. In March 1987, the Secretary of Transportation signed a lease transferring control of the airports to the Airports Authority; the lease was also signed by the Chairman of the Airports Authority, the Governor of Virginia, and the Mayor of the District of Columbia, and took effect on June 7, 1987. Pet. App. 163a-189a. The lease provided for the operation of a Board of Review, as described in the Airports Act. *Id.* at 175a-178a.

Two days after the lease was signed, the Airports Authority adopted bylaws to govern its activities. Pet. App. 148a-162a. Article IV of the bylaws establishes a Board of Review and describes its powers and functions, which are consistent with the provisions in the Airports Act. *Id.* at 151a-154a.

In early April 1987, Virginia amended its prior legislation concerning the Airports Authority in several respects, including an amendment providing explicit power for the Authority to establish a Board of Review. See 1987 Va. Acts ch. 665, § 5.5, *reprinted at* Pet. App. 111a. In June 1987, the District of Columbia similarly amended its earlier legislation in several respects, and, in one of these amendments, also empowered the Airports Authority to establish a Board of Review. See District of Columbia Re-

gional Airports Authority Act of 1985 Amendment Act of 1987, D.C. Law 7-18, § 3(e)(2), reprinted at Pet. App. 143a.

By September 1987, the Airports Authority had created and appointed the Board of Review. Pet. App. 6a.

3. In March 1988, the Airports Authority submitted to the Board of Review a new Master Plan for National Airport. The Board of Review voted the following month not to disapprove it, and the Airports Authority has begun implementation of the Plan. The Master Plan provides for construction at National Airport which will, among other effects, make it possible for the airport to accommodate larger aircraft. The size of the terminals and parking facilities will also be significantly expanded. Pet. App. 6a, 36a, 41a.

4. In November 1988, respondents Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), and two individual members of CAAN filed this action against petitioners (the Airports Authority and the Board of Review). Respondents<sup>3</sup> alleged that the Master Plan was "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents further alleged that the Board of Review's power to disapprove Authority actions violates several constitutional provisions and the separation of powers doctrine. *Ibid.* They therefore sought a declaratory judgment that the Board of Review's authority "under 49 U.S.C.

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<sup>3</sup> Although the United States, which intervened in the court of appeals, is a respondent pursuant to Sup. Ct. Rule 12.4, references in this brief to respondents are to CAAN and the two individual plaintiffs.

§ 2456(f)(4)" is unconstitutional and void, and an injunction preventing the Board from exercising its review authority and taking any other actions under the Act; they also sought a declaratory judgment that the Airports Authority is forbidden to implement any actions required to be submitted to the Board, and an injunction preventing the Airports Authority from implementing the Master Plan for National Airport. J.A. 10.

5. In July 1989, the district court granted summary judgment to petitioners, upholding the validity of the Airports Authority structure. Pet. App. 55a.

The district court first ruled that this case is ripe, despite the fact that the Board of Review's veto authority had not been exercised with respect to the Master Plan. Pet. App. 37a-39a.<sup>4</sup> The court also concluded that respondents have standing because an increase in air traffic at National Airport could not occur without the improvements provided for by the Master Plan. *Id.* at 39a-42a. Alternatively, the court found standing because respondents' influence over decisions regarding National Airport has been diminished by the ban against local representation among the Members of Congress on the Board of Review. *Id.* at 42a-43a.<sup>5</sup>

Turning to the merits, the district court first rejected the contention that the Board of Review is

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<sup>4</sup> The Board of Review has exercised its veto power once, on an unrelated matter (a proposal concerning the Dulles Access Road). Pet. App. 38a; J.A. 83-84, 91-92.

<sup>5</sup> The court also rejected petitioners' claim that respondents should be required to exhaust their administrative remedies because respondents were participants in an ongoing study of noise problems being conducted by the Authority. Pet. App. 39a.

merely “an arm” or “an agent” of Congress. The court noted that the Airports Authority appoints the members of the Board of Review and can remove them; that the Board of Review members serve in their individual capacities as representatives of users of the airports (49 U.S.C. App. 2456(f)(1)); and that, in order for the Secretary to enter into a lease, the Airports Authority must be independent of the federal government as well as Virginia and the District of Columbia. It concluded that the Board of Review is therefore not an agent of Congress for federal separation of powers purposes. Pet. App. 46a-50a.

The district court further rejected the claim that the Board of Review was “mandated” by federal law. The court emphasized that both Virginia and the District of Columbia voluntarily created the Airports Authority and entered into the lease with the federal government. Pet. App. 50a-51a. Accordingly, the Board of Review “derives its existence from state law, not federal law.” *Ibid.* The court thus concluded that, in view of the state law character of the Airports Authority and its Board of Review, there is no conflict with constitutional requirements for federal offices and the exercise of federal power. *Id.* at 51a-54a.

6. Respondents appealed, and, pursuant to 28 U.S.C. 2403(a), the Attorney General intervened on behalf of the United States to defend the statutory scheme. A divided panel of the District of Columbia Circuit reversed the judgment of the district court and concluded that the Board of Review is unconstitutional.

The court first concluded that respondents’ claims are justiciable. Pet. App. 8a-9a. Finding that the

issue “warrant[s] little discussion,” it agreed that the case is ripe. *Id.* at 9a.\* The court then determined that respondents’ allegations of injury from noise, air pollution, and risk of injury are “‘fairly traceable’” to the Master Plan, which would provide for a “significant increase in air traffic.” *Ibid.* The court thus found it unnecessary to address the district court’s alternative basis for standing. *Ibid.*

On the merits, the majority first rejected the argument that the Board of Review is not exercising federal power. The court emphasized that the authorizing statutes of Virginia and the District of Columbia do not spell out the powers and functions of the Board of Review in detail; instead, the federal Airports Act contains specific requirements concerning the Board. Pet. App. 10a-13a. The court concluded that the Board thus carries out “‘significant authority pursuant to the laws of the United States’” (Pet. App. 10a, quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)), because the federal statute defines the character of the Board of Review. Pet. App. 10a-11a.

Having determined that federal power is being exercised, the court of appeals held that the Board of Review is unconstitutional on general separation of powers grounds. It concluded that the members of the Board of Review are implementing executive functions and are subject to congressional control. Pet. App. 15a-19a. Contrary to the district court’s analysis, the court also emphasized that, in its view, Congress retains removal power over the members of the Board of Review because it can remove Members of Congress from the pertinent congressional commit-

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\* The court also summarily agreed that respondents were not required to exhaust administrative remedies. Pet. App. 9a.

tees, thereby making them ineligible for continued service on the Board. *Id.* at 18a.<sup>7</sup>

Judge Mikva dissented. He questioned the court's characterization of the Board as a federal entity and concluded that "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." Pet. App. 22a. Judge Mikva then concluded that, even if the entity is exercising federal power, it is not unconstitutional. *Id.* at 22a-26a. Judge Mikva also disagreed with the majority's removal analysis. He concluded that the Airports Act should be read to vest removal authority over Board of Review members with the Airports Authority Board of Directors both because the appointment authority lies with the Airports Authority Board of Directors, and because statutes should be construed to avoid constitutional problems. *Id.* at 24a-26a.

#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case presents a novel and difficult issue—the validity of a federal lease condition, readily accepted by state authorities, requiring the appointment of Members of Congress to a state-created entity. Although we believe that such a condition would in most instances be unconstitutional, we conclude that it is permissible in the unusual circumstances at issue here.

1. The question of justiciability in this case raises issues of both standing and ripeness. Although these

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<sup>7</sup> Despite its holding, the court directed that "actions taken by the Board to this date not be invalidated automatically on the basis of our decision." Pet. App. 19a (citing *Buckley v. Valeo*, 424 U.S. at 142).

issues are not free from difficulty, we believe that respondents' claims are justiciable.

On the issue of standing, respondents claim that they suffer from various harmful effects of air and ground traffic at National Airport, that the Master Plan will aggravate these injuries by increasing traffic at National, and that invalidation of the Board of Review would remedy this injury by preventing implementation of the Master Plan. To some extent, respondents' claims of injury are speculative and attenuated because increased airport traffic is also dependent on decisions by other actors, including commercial airlines and the Federal Aviation Administration (FAA). Nevertheless, the Master Plan includes specific changes that will facilitate increases in the number of passengers and of flights, and respondents have therefore alleged a sufficient injury, which is traceable to the Master Plan and subject to judicial remedy.

On the issue of ripeness, we believe that this matter is ripe for judicial review even though the Board of Review did not veto the Master Plan and it is the veto authority that respondents have challenged. Precedents from this Court teach that, even when a power to remove or disapprove has not been exercised, the validity of such a provision may be ripe for judicial resolution if, as here, the very existence of the power has an immediate impact. In this case, moreover, the Board of Review completed its review procedure with respect to its decision not to veto the Master Plan, and nothing further remains to be done with respect to that procedure. Therefore, respondents' challenge to the Board of Review's authority is ripe.

2. With regard to the merits, it is clear that the Constitution does not prohibit Members of Congress

from holding state offices; the Framers explicitly considered such a prohibition and rejected it. 1 M. Farrand, *The Records of the Federal Convention of 1787* (1937 ed.) 20-21, 386-393, 428-429. But it is also clear that Members of Congress may not hold other federal offices, legislate without bicameralism and presentment to the President, or perform federal executive functions. *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

In the present case, appointment of the Board of Review, which would be permissible if undertaken by a State on its own, is made in response to a federal condition. The federal condition, which would be impermissible if it established a congressional board with veto power over a federal agency, involves not a federal agency but an agency created at the state level by a state entity (which would have the ability to make the appointments on its own).

In most instances, a condition of this kind—requiring a state or local entity to appoint Members of Congress to a state office as a condition of some federal aid or benefit—would violate separation of powers principles because it would pose a substantial threat of congressional aggrandizement and incursion on the Executive Branch. But we believe that, in the unusual circumstances of this case, no such threat exists. In the present case, Members of Congress have special and distinctive interests as individuals. Moreover, the case is one in which the Executive Branch has agreed with the Legislature on the permissibility of the organizational structure under which the airport property has been leased.

a. Contrary to the court of appeals' analysis, the Board of Review exercises state, and not federal, power. A conclusion that the authority is exercising federal power fails to give appropriate weight and

respect to the significance of the independent enactments by Virginia and the District of Columbia; it also raises questions concerning a wide variety of cooperative regimes in which state programs accord with specifications in federal statutes.

That the Board of Review is exercising state authority is necessary, but far from sufficient, to establish the validity of the condition. If existence of state authority were the only requirement, such conditions could be adopted by Congress in many circumstances in which the functions and responsibilities of the Executive Branch would be significantly impaired.

b. In addition to the state character of the challenged authority, this case presents an exceptional circumstance that obviates the threat of significant incursion on the Executive Branch or aggrandizement of legislative power. A rare, and in our view, essential element of the validity of the Board of Review arrangement here is that Members of Congress are not only designated to serve "in their individual capacities," but also do in fact have special and distinctive individual concerns that justify that designation. As a result of their responsibilities, and especially their need to travel to and from their legislative districts, Members of Congress are frequent and regular users of the two airports involved here.

c. The validity of the Board of Review is further supported by two additional circumstances present in this case. First, federal ownership and operation of major-air-carrier airports is an anomaly; all other such airports are operated at the state, regional, or local level. Second, the Executive and Legislative Branches have agreed on the formulation and implementation of the statutory condition of the airports' lease.

## ARGUMENT

### **I. THE CHALLENGE TO THE CONSTITUTIONALITY OF THE BOARD OF REVIEW IS JUSTICIALE**

Although the issues are not free from difficulty, we believe that respondents have standing and that their claims are ripe for judicial resolution.

#### **A. Respondents Have Standing**

To have standing, respondents must allege a sufficiently concrete and particularized injury, which is traceable to the challenged actions of petitioners and which can be remedied by the courts. See *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.*, 454 U.S. 464, 472 (1982).

Respondents' complaint alleges that they suffer from the activity level at National Airport, and that this activity causes noise, safety problems, and air pollution. J.A. 4-5; see also J.A. 85-86. An affidavit by a CAAN director further claims that CAAN members are "adversely affected by the traffic congestion resulting from passenger activity" at National, that some members have "developed health problems that they attribute to the air traffic," and that "others' property values have suffered as a result of their proximity to the airport or its flight path." J.A. 86.

Respondents' complaint alleges further harm from the Master Plan on the ground that it is "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents' motion for summary judgment states that their interest arises because "[t]he Air-

ports Authority's master plan proposes to expand National Airport facilities and passenger levels, which, in turn, will cause the noise and other airport problems to worsen." Pltf. Memo. Suppt. Mot. for Summary Judgment 16. The CAAN director's affidavit also maintains that injury will occur because the Master Plan "proposes to expand the airport's facilities, to build them to accommodate wide-bodied jets, to increase passenger levels, and to increase air carrier traffic by utilizing currently unused slots." J.A. 86.

To an extent, the claim of injury is speculative and attenuated because the Plan is a limited one and because increases in activity at National Airport are in part dependent on decisions by others. Although a new terminal is being built, the Master Plan preserves the existing number of aircraft gates. J.A. 89-90. The Plan improves surface traffic flow and parking, but does not change the length, number, or orientation of runways. J.A. 90. Moreover, the Airports Act as well as the lease between the Secretary of Transportation and the Airports Authority provides that the Airports Authority *cannot increase* the number of aircraft operations authorized by FAA regulations on October 18, 1986. See 49 U.S.C. App. 2454(e)(5)(C); Pet. App. 172a; J.A. 90. See also 49 U.S.C. App. 2458(e)(1). (FAA Administrator may not increase the number of takeoffs and landings from that authorized by FAA regulations on October 18, 1986). Furthermore, although some of the authorized flight slots are currently unused, commercial airlines must decide whether to schedule flights for currently unused slots. C.A. App. 170, 314. Finally, decisions on whether to use larger aircraft are also made by the commercial airlines and require FAA approval. J.A. 91.

Thus in some respects, respondents' asserted injuries resulting from the Master Plan are far from certain. This uncertainty places respondents' standing in question. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43-45 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-507 (1975).

Yet the Master Plan does call for changes that will facilitate increases in airport traffic. The Plan includes new aircraft gates capable of handling larger aircraft than before. Pet. App. 41a; J.A. 91. It also includes an additional taxiway turnoff to reduce aircraft time on the runway and thereby improve airport capacity. Pet. App. 41a; Pltf. Exh. 16 at 10. The Plan itself anticipates, and proposes changes that will foster, an increase in the number of flights and passengers. See Pet. App. 41a; C.A. App. 170, 314, 330; Pltf. Exh. 16 at 10.

Since respondents' claims of injury from increased traffic at National Airport are in part attributable to the Master Plan, it appears to us that respondents have asserted a sufficiently concrete and personalized injury, traceable to the actions of petitioners. And since the Master Plan could not have been adopted and cannot be implemented without the Board of Review, respondents' injury can be remedied by the relief they seek.\*

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\* See 49 U.S.C. App. 2456(h) (if Board of Review is unable to carry out functions by reason of a judicial order, Airports Authority shall have no authority to perform any of the acts required to be submitted to the Board of Review); Pet. App. 154a (Airports Authority bylaws provision to same effect); *id.* at 178a (lease provision to same effect).

#### B. Respondents' Claim Is Ripe

Ripeness has two dimensions. First, a claim must be sufficiently ripe to meet Article III case or controversy requirements. Second, the ripeness doctrine is also premised on prudential considerations. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). In this case, we believe that the Article III requirements have been met because there is a real conflict between the parties, and the action taken by the petitioners assertedly causing harm to the respondents (the decision not to veto the Master Plan) has already occurred. Thus, the ripeness concerns here are prudential in nature. Although the Board of Review did not exercise its veto authority with respect to the Master Plan, we conclude that respondents' challenge to that authority is nevertheless ripe.

As this Court made clear in *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986), the fact that a mechanism for controlling official conduct is not exercised does not necessarily render unripe a dispute regarding that mechanism. *Bowsher* involved a contention that the Comptroller General may not be authorized to carry out executive functions because he is an agent of Congress, and that his status as an agent of Congress was shown in part by a statutory provision making him removable by that body. A question of ripeness was raised, however, because that power of removal had never been exercised (or even threatened). This Court found the case ripe for review because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." 478 U.S. at 727 n.5 (internal quotation marks

omitted). Thus, the very existence of the removal mechanism was held sufficient to affect the role of the Comptroller General.

Although the threat of removal of an official is not identical to the threat of disapproval of his actions, the logic of *Bowsher* is applicable here. The Board of Review's veto power undoubtedly has an impact on the Airports Authority, whether the power is exercised or not, as the Authority contemplates formulation of the proposals that must be considered by the Board.

Similarly, in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), this Court reached the merits of the severability of a legislative veto provision that had never been used. That provision had not been used because the controversy arose after such devices had been invalidated in *iNS v. Chadha*, 462 U.S. 919 (1983). Although this Court found it unnecessary to discuss the question of ripeness, the court of appeals had considered the issue and concluded that the matter was ripe. See *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985).<sup>9</sup>

Additionally, the Third Circuit found the controversy ripe for review in *Ameron, Inc. v. U.S. Army Corps of Engineers*, 809 F.2d 979, 986-988 (1986), cert. granted, 485 U.S. 958, cert. dismissed, 488 U.S. 918 (1988), in circumstances closely analogous to those here. In *Ameron*, the court reached the merits of a challenge to the Comptroller General's statutory authority to extend the length of an auto-

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<sup>9</sup> See also *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984). But see *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984).

matic stay of contract implementation by the government following a protest of the award of the contract. The Comptroller General had not exercised the challenged authority; the court nevertheless held the controversy ripe because the Comptroller General's ability to exercise the power was found to have an actual impact on the contracting process.

We also note, however, that in *Clark v. Valeo*, 431 U.S. 950 (1977), this Court summarily affirmed a decision of the D.C. Circuit, which had found that a challenge to a congressional veto provision was not ripe for review because the veto provision had not been used. *Clark v. Valeo*, 559 F.2d 642, 649 (*in banc*). But in *Clark*, the court of appeals went on to point out that the challenge to the legislative veto mechanism arose before Congress's period to exercise its veto power had expired, and Congress had adjourned without acting. In contrast, in this case, Board of Review consideration of the Master Plan, as proposed by the Airports Authority, has been completed.

Thus, we believe the challenge to the Board of Review's veto power is ripe for judicial determination. The analysis set out in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967), supports this conclusion. That analysis focuses on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149.<sup>10</sup> The issue here is "fit for judicial decision" because, in addition to the "here-and-now subservi-

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<sup>10</sup> Although *Abbott Laboratories* arose in an administrative law context, it remains the "leading discussion of the doctrine" of ripeness. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

ence" analysis suggested by *Bowsher*, the Board of Review has taken all necessary steps regarding approval of the Master Plan. The review process is therefore final, making the case concrete. See *Abbott Laboratories*, 387 U.S. at 148-149.

Furthermore, as a result of the imminent implementation of the Master Plan, respondents are threatened with the injuries they allege unless they prevail in this challenge. Thus, we believe the *Abbott Laboratories* standards have been met.

## **II. THE STATUTORY LEASE CONDITION REQUIRING THE APPOINTMENT OF MEMBERS OF CONGRESS IS CONSTITUTIONAL IN THE UNUSUAL CIRCUMSTANCES OF THIS CASE**

Respondents challenge the validity of the Board of Review, claiming that it violates the constitutional separation of powers, as well as the bicameralism requirement (Art. I, §§ 1 and 7), and the Presentment Clauses (Art. I, § 7, Cls. 2, 3). J.A. 10. Respondents also argued below, though they did not allege in their complaint, that service on the Board of Review by Members of Congress is inconsistent with the Appointments Clause (Art. II, § 2, Cl. 2), and the Incompatibility and Ineligibility Clauses (Art. I, § 6, Cl. 2). Pet. App. 19a, 53a-54a.

We agree with respondents that separation of powers principles, as well as the bicameralism and presentment requirements, sharply restrict the manner in which Congress or its agents may act within our constitutional system. Nevertheless, we believe that the Board of Review's authority is constitutional in the special limited context of this case.

It is clear that a State may, consistently with the Constitution, appoint Members of Congress to state

offices. It is also clear that Members of Congress are precluded by specific provisions of the Constitution from serving on a federal Board of Review that has veto power over the actions of a federal agency or that otherwise exercises federal governmental authority. In the present case, the Airports Authority's Board of Review is created and appointed by the Airports Authority, which is a creature of state and local law, but the federal Airports Act itself specifies that such a Board is a condition for the federal lease.

Although such an arrangement does not violate any specific constitutional prohibition, we believe that, in most circumstances, such a statutory condition would be unconstitutional because it would pose a threat of congressional aggrandizement and of significant intrusion on the functions and responsibilities of the federal Executive Branch. Because of a highly unusual combination of circumstances, however, we conclude that the statutory lease condition at issue here does not pose such a threat and is permissible.

### **A. States May Appoint Members Of Congress To State Offices**

It is undisputed that States may appoint Members of Congress to state offices. Indeed, the Framers specifically considered whether to prohibit Members of Congress from holding state offices, and explicitly decided against such a limitation. Thus, if a State, acting entirely on its own and without federal inducement, appointed Members of Congress to a state Airports Authority, the appointments would be constitutional.

As ratified, the Constitution contains an Incompatibility Clause that bars Members of Congress from

simultaneously holding federal office,<sup>11</sup> and an Ineligibility Clause that prohibits Members of Congress from being appointed to federal offices that were created, or for which the “Emoluments” were increased, during their congressional tenure.<sup>12</sup> Neither Clause prohibits Members of Congress from holding state office.

Introduced at the Constitutional Convention by Edmund Randolph as part of “the Virginia Plan,” these provisions originally did include a prohibition against holding state office. See 1 M. Farrand, *The Records of the Federal Convention of 1787* (1966 ed.) 20-21. See generally *Signorelli v. Evans*, 637 F.2d 853, 859-862 (2d Cir. 1980). While there was considerable discussion of the aspects of Randolph’s proposal prohibiting Members of Congress from holding federal offices, the Framers decisively rejected the prohibition of simultaneous state appointments. Charles Pinckney moved to strike it, and Roger Sherman seconded this proposal, explaining: “It [would] seem that we are erecting a Kingdom at war with itself. The Legislature ought not to be fettered in such a case.” 1 M. Farrand, *supra*, at 386. The proposed state office ineligibility provision for Members of the House of Representatives was then defeated by an 8 to 3 vote (*ibid.*), and James Wilson commented: “By

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<sup>11</sup> The Incompatibility Clause provides: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” Art. I, § 6, Cl. 2.

<sup>12</sup> The Ineligibility Clause provides: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.” Art. I, § 6, Cl. 2.

the last vote it appears that the convention have no apprehension of danger of state appointments.” *Id.* at 393.<sup>13</sup>

Three days later, a similar proposed state office ineligibility provision for Senators was also rejected, with Pinckney urging that “the States ought not to be barred from the opportunity of calling members of [the Senate] into offices at home. Such a restriction would also discourage the ablest men from going into the Senate.” 1 M. Farrand, *supra*, at 428-429. See also 1 W. Benton, *1787: Drafting the United States Constitution* 711, 722, 726-727 (1986).

During the ratification debates, James Madison confirmed the rejection of a prohibition against Members of Congress serving in state offices. In *The Federalist*, No. 56, he defended the proposed House of Representatives against an attack that it would be too small to have adequate knowledge of the interests of its constituents by noting, among other points, that, “[t]he representatives of each State \* \* \* will probably in all cases have been members, and may even at the very time be members, of the State legislature \* \* \*.” *The Federalist Papers* 348 (C. Rossiter ed. 1961).

Thus, the text and history of the Constitution make clear that States may appoint Members of Congress to hold state offices. Indeed, the practice of appointing Members of Congress to state positions has continued into modern times.<sup>14</sup>

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<sup>13</sup> A previous motion to strike the state ineligibility provision had failed on a 5-4 vote. See 1 M. Farrand, *supra*, at 217; *Signorelli*, 637 F.2d at 861 n.8.

<sup>14</sup> For example, selected Members of Congress serve on the Board of Directors of the Massachusetts Centers of Excellence. See Def. Exh. 9.

**B. Members of Congress May Not Hold Other Federal Offices, Exercise Federal Executive Functions, Or Legislate Without Bicameralism And Presentment**

In contrast, separation of powers principles sharply constrain the role of Congress and its Members at the federal level. As discussed, under the Ineligibility and Incompatibility Clauses, Members of Congress may not hold other “Office[s] under the United States” simultaneously with congressional office; nor may they be appointed to a “civil Office under the Authority of the United States,” which was created or for which “Emoluments” were increased during their congressional tenure. See notes 11 & 12, *supra*. These limitations themselves reflect an important separation of powers principle. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

More fundamentally, Congress may not exercise the functions of the Executive Branch. “The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). Thus, federal executive functions may not be entrusted to an individual over whom Congress retains removal power. *Bowsher*, 478 U.S. at 726-727. The consequences of such an arrangement would be that “Congress in effect \* \* \* retain[s] control over the execution of the Act and \* \* \* intrude[s] into the executive function. The Constitution does not permit such intrusion.” *Id.* at 734. Instead, “once Congress makes its choice in enacting legislation, its participation ends.” *Id.* at 733. Although Congress has “abundant means to oversee and control its admin-

istrative creatures,” including “durational limits on authorizations and formal reporting requirements” (*Chadha*, 462 U.S. at 955 n.19), Congress may not itself execute the law. *Id.* at 955; see also *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928); *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

In exercising its legislative power, moreover, Congress must observe the requirements of bicameralism (Art. I, § 1 and § 7, Cl. 2) and presentment to the President (Art. I, § 7, Cls. 2, 3). These requirements are “integral parts of the constitutional design for the separation of powers.” *Chadha*, 462 U.S. at 946. Thus, Congress “may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress.” *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring in the judgment). For “[i]f Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade ‘the carefully crafted restraints spelled out in the Constitution.’” *Id.* at 755, quoting *Chadha*, 462 U.S. at 959.

As a result, just as it is clear that a State, acting entirely on its own volition, may appoint Members of Congress to a Board of Review, so too it is equally clear that, at the federal level, Congress may not require the appointment of its Members to a Board of Review that holds veto power over the actions of a federal agency or that otherwise exercises federal governmental power. In addition to possible Incompatibility and Ineligibility Clause problems, such a requirement would violate fundamental separation of powers principles because Congress would, through

its Members, be exercising federal executive functions. See *Bowsher*, 478 U.S. at 732-734. Moreover, to the extent that the Members' actions in such a context were viewed as legislative, those actions would also be impermissible because they would be undertaken without bicameralism or presentment. *Chadha*, 462 U.S. at 951-959.

**C. Although A Federal Condition That States Appoint Members Of Congress Would Be Impermissible In Most Circumstances, The Condition Is Not Unconstitutional In The Limited Circumstances Of This Case**

In our view, a federally imposed condition on a grant or authorization to the States—that States appoint Members of Congress to state offices and thereby exercise state authority—would be unconstitutional in most circumstances. The reason is not that such a requirement would violate the Incompatibility and Ineligibility Clauses; by their terms, those Clauses apply only to offices of the United States. For a similar reason, such a requirement would not violate the requirements of bicameralism and presentment—discharge of the duties of a state office is not an exercise of federal legislative power. Instead, such a condition would, in most circumstances, be unconstitutional because it would allow Members of Congress to evade the “carefully crafted restraints” of the Constitution (*Chadha*, 462 U.S. at 959)—to act in an extra-legislative capacity after enacting a statute, and thereby to threaten the Executive Branch’s exclusive responsibility for federal executive functions. Although we believe that a conclusion of unconstitutionality will attend such a condition in most instances, we believe that, in the unusual circumstances of this case, such a conclusion is not warranted.

1. At the outset, we emphasize that the powers of the Airports Authority—and of the Board of Review—derive from state authority. This is a necessary, but far from sufficient, condition for constitutionality.<sup>15</sup> Both Virginia and the District of Columbia have enacted valid statutes authorizing the operations of the Airports Authority and the Board of Review, and, indeed, without those statutes, the Authority and the Board could neither exist nor function. This exercise of sovereign power by Virginia and by the District has an independent stature and should not be minimized. We strongly disagree with the court of appeals’ conclusion that the Airports Authority’s Board of Review is exercising federal authority. In our view, the court of appeals’ analysis unjustifiably denigrates the significance of the independent enactments by Virginia and the District. The state and local governments are neither ciphers nor parrots of the federal government: their legislative enact-

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<sup>15</sup> In *Springer v. Philippine Islands*, *supra*, this Court held, on separation of powers grounds, that the Philippines legislature could not participate in management of government corporations even if the management were viewed as a proprietary act (277 U.S. at 203); the Court also expressed skepticism about whether Congress could similarly participate in the management of a government corporation on a proprietary rationale (*id.* at 204-205). In that context, however, the Court was considering the activities of the legislative branches (Congress and the Philippines legislature) vis-a-vis the Executive Branch at the same level of government—in other words, the congressional aggrandizement model outlined at pages 24-26, *supra*. That analysis does not directly address the permissibility of such a condition operating at a different level of government (as in this case), and, especially, at a different level of government that clearly has the power to make the challenged appointments on its own.

ments are entitled to weight and respect in evaluating the character of their creations.<sup>16</sup>

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<sup>16</sup> Two complications concerning the state and local character of the Authority should be noted. First, a question arises whether the Airports Authority should be viewed as a creature of state law, since one of its parents is the District of Columbia. The District of Columbia, of course, is not a State under the Constitution. See, e.g., *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 452-453 (1805). Nevertheless, particularly because the District of Columbia currently acts under "home rule" authority (see District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973)), the power that it delegated to the Authority is best seen as comparable to state or local power for purposes of these federal constitutional restrictions. Cf. *Key v. Doyle*, 434 U.S. 59, 68 n.13 (1977) (D.C. Code "is a comprehensive set of laws equivalent to those enacted by state and local governments"); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953) (upholding delegation of lawmaking authority to District and analogizing authority conferred to "the police power of a state"); *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1, 7-9 (1889) (holding that, under applicable statutes, District is a municipal corporation rather than a department of the United States government); *Hobson v. Hansen*, 265 F. Supp. 902, 919-920 (D.D.C. 1967) (three-judge court) (Wright, J., dissenting) (noting that District of Columbia officials are not considered officers of the United States for purposes of the Appointments Clause). Furthermore, the Authority is not simply a creature of the District, but, in very substantial part, a creature of the Commonwealth of Virginia as well.

A second complication is suggested by the holding of this Court that congressional approval of a compact among States converts those States' agreements into "federal law" for purposes of interpreting the compact. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). But that principle does not alter the fact that the Airports Authority draws its power from state authority, and is thus itself exercising state power. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,

This state character of the Airports Authority bears emphasis. The federal Airports Act itself does not create the Board of Review, just as it does not create the Airports Authority. The federal legislation provides authority for the Secretary of Transportation to enter into a long-term lease arrangement with an Airports Authority established by Virginia and the District of Columbia. The Airports Authority itself was created by legislative acts of Virginia and the District of Columbia, and it is wholly independent of the federal government. See Pet. App. 87a-118a (Virginia legislation); *id.* at 119a-147a (District of Columbia legislation); 49 U.S.C. App. 2456(b)(1). And those jurisdictions amended their previously passed ordinances in order expressly to empower the Airports Authority—which they alone had created—to establish a Board of Review. Pet. App. 111a, 143a. The powers of that Board, in turn, are defined in the Airports Authority's bylaws. *Id.* at 151a-154a. In short, the Airports Authority is clearly created—and the Board of Review is authorized to act—by the enactments of Virginia and the District of Columbia, rather than by the Airports Act.<sup>17</sup>

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440 U.S. 391, 398-400 (1979) (For purposes of 42 U.S.C. 1983, acts of a regional entity created by an interstate compact are under color of state law rather than pursuant to federal law); *Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Co.*, 786 F.2d 1359, 1365 (9th Cir. 1986) (Members of a council implementing an interstate compact need not be appointed pursuant to the Appointments Clause; although congressional consent gives an interstate compact "some attributes of federal law," the "states ultimately empower the Council members to carry out their duties"), cert. denied, 479 U.S. 1059 (1987).

<sup>17</sup> Because the Airports Authority and the Board of Review are creatures of state and local law, respondents' Appoint-

The court of appeals' analysis—that the Board of Review is exercising federal authority—also has the potential to create serious problems in a wide range of instances unrelated to this case. As noted, the court concluded that the Board wields federal power because the nature of the Board is spelled out in the Airports Act; as a result, the court concluded, the Board is “‘exercising significant authority pursuant to the laws of the United States.’” Pet. App. 10a. But the fact that a federal statute enumerates requirements, which are then the basis of state or local action, does not transform the state action into federal action. We note that there are numerous federal grant and regulatory programs that operate on a cooperative federalism model and in which state plans must conform to federal requirements. See, e.g., *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2513 (1990) (Medicaid); *International Paper Co v. Ouellette*, 479 U.S. 481, 489-490 (1987) (Clean Water Act). Yet it has never been suggested that, in such circumstances, all constitutional provisions governing the federal government's exercise of power (including the Appointments Clause) apply to the state government's implementation of such plans. (Indeed, pursuant to the court of appeals' decision, the Airports Authority itself—not simply the Board of Review—may be “‘exercising significant authority pursuant to the laws of the United States.’”) Under the court of appeals' analysis, significant new questions about the structure and operation of these programs would be raised; the court's analysis of fed-

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ments, Ineligibility, and Incompatibility Clause objections are unavailing; those provisions relate to offices or officers “of the United States” and “under the United States.” See Art. I, § 6, Cl. 2; Art. II, § 2, Cl. 2. See also Pet. App. 53a-54a.

eral authority fails to appreciate the independent validity of the state and local statutes, and should be rejected.<sup>18</sup>

Although the issue is placed in proper perspective by recognizing that the Airports Authority operates pursuant to state law, such recognition serves only to focus the issue, not to resolve it. If the exercise of state authority were sufficient in itself to validate a statutorily imposed condition like the one in this case, a massive loophole in the separation of powers requirement would be opened. For instance, many

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<sup>18</sup> Although the existence of congressional power to remove members of the Board of Review might well serve to invalidate the statute, we disagree with the court of appeals' conclusion that the members of the Board of Review are removable by Congress. Pet. App. 18a. The Virginia and District statutes, the Airports Authority bylaws, the Airports Act, and the lease are all silent on the subject of removal; under long-settled principles, if there is silence on removal, the appointing authority retains removal authority. See *Myers v. United States*, 272 U.S. 52, 119 (1926); *Carlucci v. Doe*, 488 U.S. 93, 99 (1988). The Airports Authority's resolutions appointing members of the Board of Review, moreover, explicitly state that “[t]he terms of each of these appointments are as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of this term.” J.A. 58 (emphasis added); see also J.A. 47. Although the court of appeals rested its conclusion on the fact that Congress could remove a member of the Board of Review from a congressional committee and therefore remove him from the Board of Review, it is more consistent with general principles of removal authority—and with the Airports Authority's own interpretation of its bylaws and authority—to conclude that the Authority retains removal power, and that this power is exclusive. The provisions of the Airports Act relating to membership on the Board of Review, 49 U.S.C. App. 2456(f), are addressed to appointment, not to continuing membership or removal.

areas in which the Executive Branch plays an important role in administering cooperative programs with the States could be changed to a structure in which States would be given funds only if they appoint Members of Congress to state offices with veto power over the expenditure of those funds. Federal assistance to state programs for roads, schools, housing, and health care each could be made dependent on state appointment of Members of Congress with veto or other power over major actions, while at the same time leaving no role for the federal Departments of Transportation, Education, Housing and Urban Development, or Health and Human Services. Thus, while the exercise of state authority is essential to the validity of the Board of Review, it represents only the first step in the analysis.<sup>19</sup>

2. An additional, and in our view, essential element present in this case is that, unlike most in-

<sup>19</sup> A related point is the fact that the state and local enactments authorizing the appointment of the Board of Review—and the actions of the Authority and the state and local governments in agreeing to the lease—were entirely uncoerced. But this fact also is a necessary, but not sufficient, condition for validity.

This Court recently reiterated, in considering a condition in a spending program, that, absent undue coercion, a State may protect itself by refusing to accept a federal proposal containing a condition that the State does not like. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-590 (1937). In such a situation, the principal concern is federalism-related, and the self-protection rationale for States has considerable force. But this logic falters when applied to a situation involving separation of powers concerns. Although the States themselves provide their own defense against unwanted federal encroachment, they have no institutional concern in protecting the federal Executive Branch from an incursion by Congress.

stances in which congressional participation might be made a legislative condition, there is here a reasonable basis for the appointment of Members of Congress “in their individual capacities, as representatives of users of [the airports].” 49 U.S.C. App. 2456(a)(1), reprinted at Pet. App. 75a. See also Pet. App. 151a (Airports Authority bylaws); *id.* at 175a (lease). Indeed, Members of Congress have a special and distinctive relationship with these airports. This relationship was stressed by Secretary of Transportation Dole in her testimony to Congress as it considered the Airports Act; she noted that “Members of Congress are heavy users of the air transportation system” and that congressional service requires “many trips back to [congressional] districts.” *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986).

As individuals, Members of Congress whose districts are not near the seat of government, and who must frequently commute between the capital and their constituencies, are especially heavy users of National and Dulles airports. (And Members from Virginia, the District of Columbia, and Maryland—who are the least likely to be frequent users—are specifically excluded from the Board of Review. See 49 U.S.C. App. 2456(f)(1).) Thus, these individuals are well suited to represent the interests of all travelers who use these airports.

To be sure, Members of Congress are also users (or potential users) of roads, schools, hospitals, social security, and a myriad of other federally supported programs, but their use of these airports is qualitatively different. At most, Members of Congress are users of these other programs *to the same extent* as

other citizens. Here, in contrast, Members of Congress are individual users of the two Washington-area airports to a far greater degree than most other citizens, and in view of the necessities of their office (involving frequent trips to and from their home districts), this characteristic is predictable and inevitable.

Members of Congress have a special responsibility to travel to and from their districts in order to attend to their legislative duties and at the same time to keep in close touch with the people they represent, and this responsibility underscores their concern with the quality of service afforded by the area's airports. Indeed, the importance of travel to and from legislative sessions is recognized by the Constitution itself, which provides (in Art. I, § 6, Cl. 1) that in the course of such travel, Members shall "in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest."

Furthermore, there is clearly a legitimate interest in guarding against excessive parochialism in favor of local residents at the airports serving the thousands of people who travel to the national capital to visit, to see the national government, and to conduct business; there would, presumably, be no constitutional objection to a non-congressional Board of Review composed of citizen representatives of airport users. Because Members of Congress are frequent individual users of the airports, it is not implausible for them to fulfill that role in this limited context.<sup>20</sup>

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<sup>20</sup> As the district court points out, the legislative history contains references to the maintenance of congressional control, sometimes in stark terms. See Pet. App. 49a n.19. As the district court also points out, however, these statements must be seen in perspective, as particular statements in a floor

3. The constitutional validity of the Board of Review is, in our view, further supported by the presence in this case of two additional circumstances: the anomaly of federal operation of major-air-carrier airports, and the agreement of the Executive and Legislative Branches on the organizational structure under which the airport property has been leased.

a. The particular setting of this case—ownership and operation of major-air-carrier airports—is one in which a federal role itself is an anomaly, and the Airports Act explicitly recognizes this anomaly. See 49 U.S.C. App. 2451(5), reprinted at Pet. App. 60a; see also Pet. App. 2a. All other major-air-carrier airports in the nation are operated at the state, regional, or local level. As a result, this setting dif-

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debate and as part of a legislative history that also includes references to the Members of Congress as individual users and as representatives of users. *Id.* at 49a-50a. Particular remarks in the course of a floor debate should not be the basis for invalidating a statute. Unlike language in the statute itself, they do not affect the structural arrangements created by the law, nor do they control the responsibilities and obligations of those implementing the law.

The specification of committee membership for eight of the nine members of the Board of Review may also be seen to undermine the contention that they are appointed as individuals, since the criterion of committee membership is related to congressional duties, rather than to individual use of the airports. Although this aspect of the statutory lease condition is troubling (and was not part of the proposed statute presented to the Justice Department for review, see J.A. 34-35), we do not believe that this requirement of committee membership is sufficient to undermine the individual user rationale. If that rationale is otherwise valid, it is not invalidated by the fact that the Board is largely limited to Members with the greatest transportation expertise.

fers significantly from those in which there is a generally established federal presence.<sup>21</sup>

It might be objected that, just as other States and localities have the authority to own and operate airports without appointing a Board of Review, so too Virginia and the District of Columbia should have that ability. But that objection relates to the federalism concern (whether the condition is an undue invasion of state and local power) rather than the separation of powers concern (whether the condition is an incursion on the Executive Branch). Since the question here is one of separation of powers, the anomaly of any federal role militates against a conclusion that a threat to executive powers is presented by the limited circumstances of the condition under review.<sup>22</sup>

b. Finally, the conclusion that there is no threat of incursion on the Executive Branch is supported by the absence of any conflict between the political branches. Both the Executive and Leg-

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<sup>21</sup> In contrast, the regulation of civil aviation has, of course, long been, and remains, a vital federal responsibility. See, e.g., 49 U.S.C. 106 (responsibilities of the FAA). The federal role in the regulation of civil aviation is unaffected by the Airports Act.

<sup>22</sup> See also *Transfer of National and Dulles Airports, Hearings on S. 1017 and S. 1110 Before The Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 41 (1986) (statement of Secretary Dole) ("Almost since they opened, there has been general agreement that National and Dulles should not be operated as conventional Federal agencies."); 132 Cong. Rec. 32,138 (1986) (Rep. Gingrich) ("[M]anaging legitimately Federal activities is a big enough job. It is time to allow a regional authority to do a regional job, that of managing airports.").

islative Branches believe that the Airports Act arrangement is valid. To be sure, the agreement between the Executive and Congress is not dispositive: "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." *Chadha*, 462 U.S. at 942 n.13. But this Court has stressed that, in such circumstances, the courts are to be at their most deferential. See *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). See also *Mistretta v. United States*, 488 U.S. 361, 384 (1989).

In this case, Congress expressly raised a question with the Executive Branch regarding the constitutionality of the proposed airports legislation, and the Department of Justice responded that it believed the statute would withstand constitutional scrutiny. See J.A. 25-35. Since this is a separation of powers matter in which the two branches directly affected by the legislation have carefully considered the issue and found the statute valid, the Court should be hesitant to strike it down. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (deference to judgment of Congress is "certainly appropriate" when that body has specifically considered the question of the statute's constitutionality). See also *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."). Furthermore, the Executive Branch, in the person of the Secretary of Transportation, made an independent decision to sign the lease with the Airports Authority (Pet. App. 186a): the Airports Act authorized, but did not require, the Secretary to enter into such a

lease. See 49 U.S.C. App. 2454(a), reprinted at Pet. App. 64a.

\* \* \* \* \*

We have often argued before this Court the need to vindicate and preserve separation of powers principles. In most circumstances, a congressional condition like the one at issue here would collide with those principles because it would threaten a significant incursion on the Executive Branch. But, given the prerequisites of state authority and lack of coercion, and of the special and distinctive interests of Members of Congress as individuals—combined with the anomaly of a federal role in operating major-air-carrier airports and the specific Executive assent to the challenged provision—service by Members of Congress on the Airports Authority's Board of Review does not violate the Constitution.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MARCH 1991

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\* The Solicitor General is disqualified in this case.

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## QUESTIONS PRESENTED

1. Does a federal statute that requires that a regional airports authority must, as a condition of obtaining a lease of federal airports, give Members of Congress a veto over the operation of those airports, violate the doctrine of separation of powers, the Bicameralism and Presentment Clauses, the Appointments Clause, and the Incompatibility Clause of the Constitution?
2. Did the courts below correctly conclude that this case satisfies the ripeness and standing requirements of Article III of the Constitution?

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**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1990**

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**No. 90-906**

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**METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, et al.,**

*Petitioners,*

v.

**CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., et al.,**

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia Circuit**

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**BRIEF FOR RESPONDENTS**

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In transferring the Metropolitan Washington Airports to a regional authority, Congress gave nine of its Members a veto over the operation of the airports, notwithstanding this Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Despite the United States' attempt to limit the principles involved in this case to congressional control over airports that its Members regularly use, this scheme would provide a blueprint for Congress to create legislative vetoes over a wide range of other powers delegated under the Property and Spending Clauses of the

Constitution. In order to understand why this mechanism of legislative aggrandizement is unconstitutional, it is necessary to review the congressional origins and purposes of the Board of Review in greater detail than in the briefs of petitioners and the United States.

## STATEMENT

### I. THE TRANSFER OF THE METROPOLITAN WASHINGTON AIRPORTS.

In contrast to all other commercial airports in the United States, which are operated by state, local, or regional authorities, Washington National and Dulles International Airports were owned and operated by the federal government prior to 1987. Even though the two airports had been a net money-maker, with National Airport in particular earning a sizable annual profit, Congress had been unwilling to commit the substantial funds that were needed for capital improvements.<sup>1</sup> As a result, federal operation of the airports had led to inadequate airport facilities and related problems. Senate

Hearings at 45 (statement of Sec'y Dole) ("Under federal control, budgetary concerns have meant that improvements to the facilities are slow in coming"); Senate Report at 2 ("inclusion of the airports in the unified Federal budget has generally stymied most efforts to improve or expand facilities at either airport to keep pace with the growing commercial and air travel needs of the Washington area").

During the congressional proceedings leading to the transfer legislation, there was complete agreement that federal funds had historically been inadequate to deal with the airports' problems and that some congressional action was sorely needed to create an infusion of capital on the order of \$250 million. See Senate Report at 2. The vexing issue was whether to devise a financial solution that retained federal control or to transfer control to an entity other than the federal government, which would raise money outside the federal budget. Those who supported divestiture had been thwarted previously because of Congress' "reluctance to transfer control over the use of National Airport to a local authority that could limit service at the airport." CRS Report at 1 (Ct. App. 34).

#### A. The Initial Transfer Proposals.

In order to build political support for its plan to divest the federal government of managerial responsibilities over National and Dulles Airports, the Secretary of Transportation appointed an advisory commission to develop proposals for transferring the airports to a state, local, or regional body. Joint Appendix ("J.A.") 12. A majority of the commission recommended that the two airports be leased to a regional authority established by an interstate compact between the Commonwealth of Virginia and the District of Columbia and governed by a body whose members would be appointed by

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<sup>1</sup>*Transfer of National and Dulles Airports: Hearings on S. 1017 & S. 1110 Before Subcomm. on Aviation of the Senate Comm. on Commerce, Science, & Transportation, S. Hrg. No. 338, 99th Cong., 1st Sess. 48 (1985) ("Senate Hearings") (statement of Elizabeth Hanford Dole, Secretary of Transportation) (\$16 million positive cash flow in 1984); Senate Comm. on Commerce, Science, & Transportation, *Metropolitan Washington Airports Transfer Act of 1985*, S. Rep. No. 193, 99th Cong., 1st Sess. 5 (1985) ("Senate Report") (projected annual profits of \$21-24 million over 1987-1990 period); Congressional Research Service, *Federal Ownership of National & Dulles Airports: Background, Pro-Con Analysis, & Outlook* 2 (1985) ("CRS Report") (Joint Appendix in Court of Appeals ("Ct. App.") 35) (1983 profit of \$11.4 million).*

the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President of the United States. J.A. 15-17. The commission provided no mechanism for retaining congressional or federal oversight other than the lease mechanism and the presidential appointee on the governing body. J.A. 16-17.

After the advisory commission issued its report, Virginia and the District of Columbia enacted laws authorizing the establishment of a regional authority in keeping with the commission's recommendations. 1985 Va. Acts ch. 598 (Pet. App. 87a) (adopted on April 3, 1985); D.C. Law 6-67 (1985) (Pet. App. 119a) (signed by Mayor on October 9, 1985). Like the advisory commission recommendations, neither the Virginia nor the District of Columbia laws required, or even permitted, the establishment of a board of review that would oversee the Airports Authority's actions.

In April 1985, at the behest of the Secretary of Transportation, legislation was introduced in the Senate that embodied the advisory commission's recommendations and that also contained no board of review provisions. *See S. 1017, 99th Cong., 1st Sess., reprinted in Senate Hearings at 4.* At hearings held in the summer of 1985, the Department of Transportation and representatives of the governments of both Virginia and the District of Columbia endorsed the bill. Senate Hearings at 40-49, 78-97, 109-11, 124-26 (statements of Sec'y Dole, Donald Engen, Administrator of Federal Aviation Administration ("FAA"), Sen. Trible, Virginia Gov. Robb, Rep. Parris, Rep. Wolf, D.C. Mayor Barry, D.C. Council Chair Clarke, and D.C. Council Member Kane).

These and other supporters of the transfer bill pointed to the capability that regional authorities have to finance airport improvements by issuing bonds, as compared with the

federal government's failure to finance such improvements out of the federal budget. *See id.* at 32 (statement of Sen. Warner), 40-42, 45, 69-70 (statement of Sec'y Dole). They also favored a mechanism that would ensure a "local voice in the matters of the running of this airport, on matters of safety, on lifestyle, noise, and things of that nature." *Id.* at 37 (statement of Sen. Warner); *id.* at 50 (noise level and traffic congestion "are issues that are very much of concern to the local community. And as economic development goes forward, they are both issues that rightfully should give them a voice") (statement of Sec'y Dole).

The primary opposition was led by Senator Hollings, who wanted to retain federal control over the two airports on the theory that they "belong[] to all the people." *Id.* at 70 (statement of Sen. Hollings); *accord id.* at 36, 38, 53 (statements of Sens. Hollings & Exon). In order to preserve federal control, Senator Hollings proposed an alternative bill that would have provided \$250 million to National and Dulles Airports from the Airport and Airway Trust Fund, but the Committee on Commerce, Science, and Transportation rejected this approach. S. 1110, 99th Cong., 1st Sess. (introduced on May 8, 1985), *reprinted in Senate Hearings at 28-29;* Senate Report at 2-3. Another proponent of retaining federal control, Senator Exon, offered an amendment that would have added three members from outside the Washington metropolitan area to the Airports Authority's Board of Directors, but the Committee rejected this amendment. Senate Report at 17 ("Increased Federal membership would not be necessary to the protection of Federal interests, which are adequately guaranteed by the provisions of the bill, and would be contrary to the intent of the bill to shift control to a regional authority"); *see also id.* at 12-13 ("The Committee considered but did not adopt language to decrease Virginia representation on the Board by two members and increase

the Federal representation accordingly"). After rejecting these attempts to retain federal control over the airports, the Senate passed the airports transfer legislation, still without any board of review provisions. 132 Cong. Rec. S4116 (daily ed. April 11, 1986).<sup>2</sup>

In June 1986, the House Subcommittee on Aviation held hearings on the Senate bill and on a competing bill that would have transferred the airports to a federal corporation under the supervision of the Secretary of Transportation. *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040, & S. 1017 Before Subcomm. on Aviation of the House Comm. on Public Works & Transportation*, H.R. Hrg. No. 61, 99th Cong., 2d Sess. (1986) ("House Hearings"). Many House Members vigorously opposed the transfer because they wanted to retain federal control over the airports. Thus, one Representative stated: "Local residents opposed to nearby noise have, for many years, attempted to close National Airport and divert the traffic to Dulles... . If we transfer this airport to local control, what assurance do we have that local residents will now, all of a sudden, start

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<sup>2</sup>Maryland officials also opposed the bill because Maryland would have fewer representatives on the Airports Authority than Virginia and the District of Columbia, and joint operation of National and Dulles Airports would, in their view, give those airports an unfair competitive advantage over Baltimore-Washington International Airport ("BWI"), which is owned and operated by the State of Maryland. Senate Hearings at 97-99 (statement of Sen. Sarbanes); *id.* at 99-106 (statement of Gov. Hughes); *id.* at 111-12 (statement of Rep. Byron). As a result of a Senate amendment that provided a payment to Maryland in order to offset any competitive disadvantage that the transfer might cause to BWI, Maryland withdrew its objections. Senate Report at 17; 132 Cong. Rec. S14,862 (daily ed. Oct. 3, 1986) (statement of Sen. Sarbanes).

supporting these improvements at National?" House Hearings at 22 (statement of Rep. Sundquist). *Accord id.* at 1-3 (statements of Chairman Mineta and Rep. Hammerschmidt supporting transfer of the airports to a federal corporation). In response to these concerns, the Secretary of Transportation asserted that the transfer would serve the Members' needs for efficient and quick air service, but that further guarantees could be provided through congressional oversight of the federal lease or through the addition of "statutory language that will assure Congressional interests are addressed, even including the details of individual parking places." House Hearings at 110-11 (statement of Sec'y Dole). Without requiring further statutory provisions protecting the federal interests, the subcommittee approved the transfer legislation. See 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986).

#### B. Congress' Development of the Board of Review Provisions to Retain Congressional Control Over the Airports.

Before the full committee considered the legislation, the subcommittee drafted several substitute bills with a single goal in mind: to establish a congressional board of review with the power to veto major actions of the Airports Authority, such as the adoption of an annual budget, the issuance of bonds, the promulgation of regulations, and the adoption of development and land acquisition plans. Ct. App. 86-88, 115-18, 133-36; J.A. 28. While the drafts differed in the way that the Board of Review members would be selected, they all required that the Board be composed of Members of Congress, with two drafts adding the Comptroller General, who is a congressional official, and another adding the chief executive officers of Virginia, Maryland, and the District of Columbia. *Id.*

In order to bolster congressional support for the administration's transfer legislation, Assistant Attorney General John R. Bolton rendered an advisory opinion on the constitutionality of these proposals. See J.A. 25. In that opinion, Mr. Bolton found serious constitutional defects in the first plan, which would have created a "federal board of directors" composed of three members of the House, appointed by the Speaker, three members of the Senate, appointed by the President *pro tempore*, and the Comptroller General. J.A. 26-28; see Ct. App. 86-88; see also id. 115-18. In his view, a veto by such a board "would plainly be legislative action that must conform to the requirements of Article I, section 7 of the Constitution: passage by both Houses and approval by the President." J.A. 26, citing *INS v. Chadha*, 462 U.S. 919, 954-55 (1983). Moreover, he concluded, "since the responsibilities to be exercised by the Board are clearly operational, . . . its members would have to be appointed by the President or the head of an executive department or agency, and members of Congress could serve, if at all, only in an advisory capacity." J.A. 27 (footnotes omitted).

Mr. Bolton found similar constitutional defects in the second plan, which would have required Virginia and the District of Columbia to establish a board of directors having the same composition as the federal board in the first option. Although he concluded that Members of Congress may constitutionally exercise state executive power, the fact that the states would formally establish the board "would not change the fact that Congress is unwilling to give its consent to the transfer unless it is able to retain some direct control, through its agents, over the use of the property." J.A. 33 (emphasis in original). Because, "in form and substance it would be a creation of Congress, intended to exercise legislative authority on behalf of Congress," Mr. Bolton predicted that "the courts would view this Board as an attempt by

Congress to circumvent the clear requirements of Article I, section 7 . . ." J.A. at 32; *see id.* 32 n.16 ("we cannot ignore that the alternative requiring the states to establish the Board has been proposed precisely to avoid the clear constitutional objections raised by any direct effort by Congress to establish and empower the Board -- a context that strongly suggests Congress intends the Board, however authorized, to act as its agent").

The third subcommittee plan changed the composition of the board so that four members would be selected by the Board of Directors of the Authority from the membership of each House, a ninth member would be selected alternately from the House and the Senate, and all of the board members would be designated as representatives of airport users. Ct. App. 133-36. The Justice Department concluded that, "[a]lthough the issue is not free from doubt," J.A. 35, the third plan would not run afoul of *Chadha* because "[t]he members of the Board would serve in their individual capac[ities] as users of the airport and not as representatives of Congress, and would be appointed by the Board of Directors of the Airports Authority from names submitted by the Speaker of the House and the President *pro tempore*." J.A. 34. According to the Justice Department, "[i]f it were made clear that those members serve only in an individual capacity, to represent their personal interests in the operation of the airports, rather than as agents of Congress, we do not believe a *Chadha* problem would necessarily be presented." J.A. 33 (emphasis added). Toward that end, the Department recommended that either the bill or its legislative history state that "the congressional members of the Board shall represent only their personal interests," J.A. 34, and "that Congress does not intend the Board to function as an adjunct or agent of Congress *qua* Congress . . ." J.A. 35; accord J.A. 34 n.19 ("the congressional members would have to take care to distin-

guish between their respective roles as members of Congress and as member[s] of the board").

*C. Legislative Endorsement of the Board of Review Provisions as a Means of Retaining Congressional Control Over the Airports.*

Armed with the Department of Justice's qualified stamp of approval, the Senate added this last version of the congressional Board of Review to the transfer legislation, and then passed the amended bill as an amendment to the continuing resolution for fiscal year 1987. 132 Cong. Rec. S14,862-65 (daily ed. Oct. 3, 1986). As a precaution against Congress losing control over the airports as a result of an adverse ruling on the constitutionality of the Board of Review, the Senate inserted a "drop-dead" clause, which provides that the Airports Authority would itself lose the power to perform any of the actions that are subject to the Board of Review's veto if a court declared that veto power unconstitutional. *See* 132 Cong. Rec. H11,093 (daily ed. Oct. 15, 1986). This provision is in sharp contrast to the general severability clause in the Transfer Act, which preserves valid portions of the law if other portions are declared invalid. 49 U.S.C. App. § 2460. Despite the absence of any hearings on the Board of Review, the Senate passed this amended version without any debate or discussion. 132 Cong. Rec. S14,862-65 (daily ed. Oct. 3, 1986).

In the House floor debate, which constitutes the only recorded congressional discussion of the Board of Review provisions, numerous Members acted contrary to the Justice Department's advice and stressed the importance of the Board of Review as a mechanism for retaining congressional, not user, control over the airports. As one Member put it, the bill "provides for continued congressional control over both

airports [since] Congress would retain oversight through a Board of Review made up of nine Members of Congress [who] would have the right to overturn major decisions of the airport authority...." 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986) (statement of Rep. Coughlin).

Another Member reiterated that the "board has been established to make sure that the Nation's interest, the congressional interest[,] was attended to in the consideration of how these two airports are operated." 132 Cong. Rec. H11,103 (daily ed. Oct. 15, 1986) (statement of Rep. Hoyer). Many Members believed the transfer would "not give up congressional control and oversight -- that remains in a Congressional Board of Review," *id.* at H11,105 (statement of Rep. Conte), but one Congressman went even further and stated "[w]e will have more control [through the veto power] than before.... At present, pressure on FAA seems to be our only way to influence events at the two airports." *Id.* at H11,106 (statement of Rep. Hammerschmidt). Perhaps the most frank assessment came from Representative Smith, who stated:

Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority.... We are getting our cake and eating it too.... The beauty of the deal is that Congress retains its control without spending a dime.

*Id.* at H11,100; *accord id.* at H11,098 (statement of Rep. Lehman) (the "Congressional Board" would provide "for continuing congressional review over the major decisions of the new airport authority"); *id.* at H11,104 (statement of Rep. Smith) ("[f]or those who are concerned that local authorities won't be able to efficiently run the airports, the Congress

would retain some oversight responsibility through a board of review"); *id.* (statement of Rep. Dickinson) ("the areas of interest that we are concerned with . . . whether it be the parking for the Members . . . whether it be congressional control, these have been addressed in the proposed legislation").

The House, however, was not content with the Board of Review prescribed by the Senate bill. Thus, it approved an amendment that requires that the Board of Review consist of two members of each of the four committees with principal jurisdiction over the Washington area-airports -- the House Public Works and Transportation Committee, the House Appropriations Committee, the Senate Commerce, Science, and Transportation Committee, and the Senate Appropriations Committee -- as well as one Member of Congress chosen alternately from the House and the Senate. *Id.* at H11,097-98. The specific committee membership requirements, like the "drop-dead" provision added in the Senate, fundamentally altered the board of review provisions so that they no longer "closely resemble[d]" the version approved by the Department of Justice. U.S. Br. at 5; *see id.* at 35 n.20.

Although one Member questioned whether this revised scheme would pass constitutional muster, *id.* at H11,098, H11,099, & H11,105 (statements of Rep. Snyder), the House approved the airports transfer legislation without any discussion of why Members of Congress were needed to represent the interests of airports users generally, as opposed to the particular interests of Congress. *Id.* at H11,106. Eventually, the Senate concurred in the House amendment, and the President signed the transfer bill into law as part of a continuing resolution. 22 Weekly Comp. Pres. Docs. 1496 (Nov. 3, 1986); Metropolitan Washington Airports Act of 1986, Pub.

L. No. 99-591, §§ 6002-6012, 100 Stat. 3341 (1986) ("Transfer Act").

**D. *The Transfer Act Mandates a Congressional Board of Review with Ultimate Control Over the Airports.***

As enacted into law, the Transfer Act requires that the Board of Directors of the Airports Authority establish, as a condition of the transfer of the airports, a nine-member Board of Review that "shall consist of" Members of Congress with the requisite committee affiliations set forth in the House amendment. 49 U.S.C. App. § 2456(f)(1). While the Transfer Act states that these Members of Congress will serve "in their individual capacities, as representatives of the users of the Metropolitan Washington Airports," *id.*, they must all be Members of Congress, and they cannot be from Maryland, Virginia, or the District of Columbia. *Id.* Moreover, the Airports Authority is not free to select anyone even from the eligible Members of Congress, but is limited to the names submitted by the Speaker of the House and the President *pro tempore* of the Senate, who are not required to submit, and, in practice, have sometimes not submitted, more names than the number of vacant slots. *Id.*; J.A. 44-45, 57.<sup>3</sup>

Under the Act, the Board of Review must have the power to veto the Airports Authority's core actions. 49 U.S.C. App. § 2456(f)(1) & (4). Thus, the Airports Authority cannot authorize the issuance of bonds, appoint a chief

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<sup>3</sup>While the Transfer Act is silent with respect to the power to remove Board of Review members, the Airports Authority has claimed the power to remove members for cause. J.A. 47, 60. However, any replacement appointments must be nominated by the congressional leadership and must serve on the same congressional committees as the removed members.

executive officer, adopt an annual budget, approve development or land acquisition plans, or change its regulations, without first submitting its proposed action to the Board of Review for consideration and an opportunity to veto the action. *Id.* § 2456(f)(4).

In addition to its ability to disapprove all major actions of the Airports Authority, the Board of Review may “request” that the Airports Authority consider, vote, or report on any matter related to the two airports, and the Airports Authority has a statutory obligation to comply with any such “request” as promptly as feasible. *Id.* § 2456(f)(5). Members of the Board of Review may also participate as nonvoting members at all meetings of the Airports Authority’s Board of Directors. *Id.* § 2456(f)(6). Moreover, as a result of the Transfer Act, but not the Virginia or District of Columbia statutes, it is the Board of Directors, not the Board of Review, that is liable even for actions taken at the urging of the Board of Review or as a result of a veto. *Id.* § 2456(f)(8).

Although the Transfer Act contains a general severability clause, *id.* § 2460, the Senate-added “drop-dead” clause deprives the Airports Authority of its core powers if the Board of Review is declared unconstitutional. *Id.* § 2456(h). This provision underscores Congress’ intent to retain control over the airports either through the Board of Review or by rendering the Airports Authority essentially powerless to perform its tasks without further congressional action.

*E. Virginia, the District of Columbia, and the Airports Authority Acceded to the Board of Review as a Federally Imposed Condition on the Transfer of the Airports.*

On March 2, 1987, four months after passage of the

Transfer Act, the Secretary of Transportation and the Airports Authority entered into a lease, which requires the Airports Authority to establish, and to be bound by the veto decisions of, a Board of Review that meets the Transfer Act’s specifications. Pet. App. 175a-78a. The lease spells out the precise composition and powers of the Board of Review set forth in the Transfer Act, as well as the statutory bar on the Airports Authority taking any of the actions subject to the Board of Review’s veto power, if the Board of Review is judicially barred from exercising that power. *Id.* On March 4, 1987, the Airports Authority adopted bylaws, including the Board of Review provisions contained in both the Transfer Act and the lease. Pet. App. 151a-54a.

It was not until after the Transfer Act had been enacted and the lease had been signed that Virginia and the District of Columbia amended their previously enacted airports authority laws to add any reference to a board of review. In compliance with the conditions of the federal Transfer Act and the federal lease, these amendments give the Airports Authority the power “to establish a board of review,” although they do not require it to do so. More importantly, these laws do not describe the composition or powers of the Board of Review, let alone mandate that it be composed entirely of Members of Congress. Unlike the “drop-dead” clause in the Transfer Act and lease, these laws do not deprive the Airports Authority of the power to undertake the matters that must be submitted to the Board of Review in the event of a judicial order invalidating that Board’s veto authority. See 1987 Va. Acts ch. 665, § 5.A.5 (Pet. App. 111a); D.C. Law 7-18, § 3(c)(2) (1987) (Pet. App. 143a).

This lack of detail concerning the Board of Review’s composition and powers is in sharp contrast to the Virginia and District of Columbia provisions establishing the Airports

Authority's Board of Directors, which contain all of the requirements of the federal Transfer Act, as well as numerous powers and obligations based on state law. 1985 Va. Acts ch. 598, §§ 4-23 (Pet. App. 89a-105a); 1987 Va. Acts ch. 665, §§ 4-6 (Pet. App. 109a-14a); D.C. Law 6-67, §§ 5-24 (Pet. App. 123a-38a). This contrast is even more startling since the Board of Review has the power to override the Board of Director's decisions in direct contravention of the laws of Virginia and the District of Columbia, which make the Board of Directors responsible for the corporation's affairs. *See* D.C. Code §§ 29-332, 29-337; Va. Code Ann. § 13.1-673.

As this discussion demonstrates, the Transfer Act is the ultimate "but for" cause of the Board of Review. Had Congress not mandated the creation of such a Board of Review, the federal lease would not have required the Airports Authority to make itself subservient to Congress' operational control. Nor would Virginia or the District of Columbia have independently mandated such a body. Indeed, even in the face of the federal command in the Transfer Act and the federal lease, Virginia and the District of Columbia did no more than authorize the Airports Authority to follow its orders, without independently mandating the composition or powers of the Board of Review, or the ultimate demise of the Airports Authority in the event that the Board of Review ceases to be able to carry out its powers.

## II. PROCEEDINGS BELOW.

Respondent Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN") is a nonprofit membership organization of individuals and citizens groups who wish to minimize the noise, safety, and environmental effects of air traffic at National Airport. J.A. 85-86. Most of its members, as well as John Hechinger and Craig Baab, the individual respondents,

live under National Airport's flight path, and their lives are regularly disrupted by aircraft noise, vibrations, traffic congestion, and pollution from operations at National Airport. J.A. 86; Ct. App. 164-65, 167-68.

In March of 1988, over CAAN's opposition, Ct. App. 177-80, the Airports Authority approved a master plan for National Airport, which provides for expanding the airport's capacity to handle additional air carrier operations and increased numbers of passengers and automobiles. J.A. 70-71, 90-91; Ct. App. 170-71, 314, 317-22, 328, 389-90. Although the Board of Review had previously exercised its veto to prevent the use of the Dulles Access Road for car pool commuter traffic, J.A. 83-84, the Board voted not to veto the master plan. J.A. 78. The Airports Authority has since begun implementing the master plan by issuing bonds and beginning construction at the airport. J.A. 87.

On cross-motions for summary judgment, the district court rejected petitioners' justiciability claims. Pet. App. 55a. It found that respondents have standing because the increased noise, air pollution, and safety problems that they fear "could *not* occur without the significant improvements contemplated by the [master] Plan," Pet. App. 41a, which the Airports Authority would be unable to implement without the core powers that it would lose under section 2456(h) if respondents prevail. The court rejected petitioners' ripeness claim because the case presents a purely legal issue that is not affected by the particular manner in which a veto is exercised. Pet. App. 38a. On the merits, the district court upheld the constitutionality of the Board of Review, reasoning that because Virginia and the District of Columbia freely agreed to the lease, and the Members of Congress serve on the Board of Review in their individual capacities, federal separation of

powers principles do not apply to the Airports Authority or its Board of Review. Pet. App. 46a-47a, 51a.<sup>4</sup>

On appeal, the United States, which intervened pursuant to 28 U.S.C. § 2403(a), agreed that the case is justiciable, but supported petitioners on the merits. The Airports Authority urged the court to decide the merits, and merely reiterated its justiciability arguments in a cursory fashion in a footnote. Ct. App. Br. at 12 n.8, 15-16 n.9. In order to satisfy itself that it had jurisdiction over this case, the court of appeals briefly reviewed and summarily rejected the justiciability contentions that had been made in the district court. Pet. App. 9a. On the merits, the majority struck down the Board of Review because it found “that the Board is effectively an agent of Congress and that its functions are executive in nature.” Pet. App. 2a. Although the dissenting judge

<sup>4</sup>Meanwhile, in another case, a union challenged, on both statutory and separation of powers grounds, the Labor Code adopted by the Airports Authority, which had survived review by the Board of Review. Without deciding whether the union’s constitutional challenge was ripe, the district court adopted the ruling on the merits in this case and found for the union on one statutory claim and against the union on its remaining statutory and First Amendment claims. *Federal Firefighters Association, Local 1 v. United States*, 723 F. Supp. 825, 826, 828 (D.D.C. 1989). The union has appealed the separation of powers and adverse statutory rulings. *Metropolitan Washington Airports Authority Professional Fire Fighters Ass’n, Local 3217 v. United States*, No. 89-5411 (D.C. Cir.). The relief sought in that case, invalidation of the Labor Code, differs from what respondents seek here, a judicial order preventing the Board of Review and Airports Authority from taking any actions that are subject to the veto authority. Even under the court of appeals’ direction “that actions taken by the Board to this date not be invalidated automatically on the basis of our decision,” Pet. App. 19a, the Fire Fighters could still seek invalidation of the Labor Code in the particular circumstances of that case.

agreed that the case is justiciable, he concluded that the Board comports with the Constitution because, in his view, Congress does not control the Members of Congress who serve on the Board. Pet. App. 22a-26a.<sup>5</sup>

## SUMMARY OF ARGUMENT

The Board of Review constitutes an attempt by Congress to recapture the legislative veto and to assign executive functions to itself. In essence, Congress is using a condition on a grant of federal property to aggrandize itself in a manner that it no longer can in relation to Executive Branch agencies. If upheld, the Board of Review provisions would provide a roadmap that would enable Congress to evade constitutional limitations on the way in which it may exercise its authority whenever federal property or money is the subject of legislation.

While a state could decide on its own to appoint Members of Congress to a state office, Congress cannot compel a state to do so as a condition of receiving federal property. When Congress requires that its Members be given executive powers, as it did here, the conclusion is inescapable that Congress is accreting powers to itself. Fearing this sort of congressional aggrandizement, the Framers limited Congress to lawmaking through bicameral passage of laws, subject to a presidential veto, and forbade Members of Congress from exercising executive powers.

The United States agrees that Congress may not, as a

<sup>5</sup>Both the district court and the court of appeals rejected the exhaustion of administrative remedies defense that the Airports Authority has now abandoned. Pet. App. 9a, 38a-39a.

general matter, exceed these constitutional limitations by imposing a Board of Review condition on the transfer of federal property or funds. However, it seeks to save this particular Board of Review based on what it characterizes as the unique circumstances of this case. Not only do all of the United States' reasons for rejecting congressional review boards apply fully here, but its proposed distinctions have no basis in the Constitution and offer no limiting principle to preclude Congress from similarly aggrandizing itself in the future whenever it disposes of federal funds or property.

## ARGUMENT

### I. THIS CASE IS JUSTICIALE.

Before turning to the merits, respondents will address the justiciability arguments made by the Airports Authority. Like the United States, Br. at 14-20, respondents agree that this case is justiciable.

#### A. *Respondents Have Standing to Bring this Challenge.*

The Airports Authority has never disputed that respondents are injured by noise, air pollution, and safety problems associated with flights to and from National Airport, and both courts below plainly found such an injury. Pet. App. 9a, 40a-41a. The Airports Authority's claim is that the master plan will not lead to increased noise, congestion, and pollution from operations at National Airport.

However, the district court made a finding, based on the Airport Authority's own master plan documents, that "an increase in both passengers and flights could *not* occur without the significant improvements contemplated by the Plan." Pet. App. 41a (emphasis in original). Even the Airports

Authority concedes that its master plan provides for several larger gates that can accommodate wide-bodied jets, some of which comply with night-time noise restrictions, but which currently cannot use National Airport's facilities at all, let alone at night. Pet. Br. at 38 n.21; see J.A. 91; Ct. App. 390. The master plan will also add a taxiway turnoff that will reduce time on the runway and thereby improve airport capacity. Pet. App. 41a; Pl. Ex. 16 at 10. Similarly, the plan makes numerous changes that will enable the airport to accommodate more passengers and more air operations. Ct. App. 172, 174-75. Based on the introduction of wide-bodied jets and the use of currently unused slots for aircraft operations, the master plan projects that it will enable National Airport to handle more night-time flights and additional daytime air carrier operations, which will significantly increase the number of passengers and the amount of automobile traffic at the airport. J.A. 86, 91; Ct. App. 170-71, 314, 317-22, 328, 389-90.<sup>6</sup>

The Airports Authority seeks to ascribe the increased air and passenger traffic to other intervening causes over which it has no control. However, it does not, nor can it, dispute that the master plan is a necessary prerequisite for the projected increase in operations at National Airport. Thus, as the United States concludes, "respondents have asserted a sufficiently concrete and personalized injury, traceable to the actions of petitioners" to maintain this action. U.S. Br. at 16.

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<sup>6</sup>While the Transfer Act fixes the number of takeoffs and landings per hour at National Airport, it eliminated the previously existing statutory cap on the number of passengers using that airport annually, 49 U.S.C. App. § 2458(e), and there are currently unused slots for air carrier operations at non-peak hours. Ct. App. 170, 314.

Respondents' injuries are also redressable by this action. As a practical matter, the Airports Authority can implement its master plan only if it can raise and budget the necessary funds. However, if respondents are successful in this lawsuit, the Board of Review will be unable to exercise its veto power, and, because of 49 U.S.C. App. § 2456(h), the Airports Authority will lose its authority to issue bonds, to adopt an annual budget, and to adopt or revise a master plan, all of which are necessary for expansion of National Airport. Thus, invalidating the Board of Review will make it impossible for the Airports Authority to carry out the master plan. As the district court observed, and the court of appeals agreed, the relief sought would redress respondents' injuries because "if the Authority may not issue bonds or adopt a budget, continued construction at National would cease, the additional capacity otherwise possible would be halted, and plaintiffs' asserted injuries would be averted." Pet. App. 41a-42a; *id.* 9a.

Respondents have standing to challenge the Board of Review's authority for another reason. The doctrine of separation of powers is ultimately designed to protect the people from arbitrary exercises of power. Thus, in *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), this Court concluded that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Accord Chadha*, 462 U.S. at 935-36. Based on *Buckley* and the core purposes of the separation of powers doctrine, respondents have standing to challenge a regulatory action to their detriment that is adopted by a process that violates the Constitution. In this case, respondents' injuries from that unconstitutional process are compounded because the Board of Review excludes local representation and thus diminishes respondents' influence over

airports matters. Pet. App. 42a. For all these reasons, respondents have standing to challenge the Board of Review.

#### B. *This Case is Ripe for Review.*

This case, in the words of the district court, "is as ripe as it ever will be." Pet. App. 38a. Since it raises purely legal questions based on well-developed precedent, "the particular manner in which the veto power is exercised will [not] affect the constitutionality *vel non* of the body that exercises it." *Id.* (footnote omitted). Indeed, in the wake of *Chadha*, this Court has not waited for a legislative veto to be exercised before reviewing its legality. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 & n.3 (1987). Not only would the exercise of a veto to respondents' detriment add little to the finality or definition of the legal issues under review, but a party aggrieved by an exercised veto may well be unable to obtain judicial review because a successful challenge would not redress the challengers' injuries in light of section 2456(h), which deprives the Airports Authority of the underlying power to undertake any action that is subject to a veto, if the veto is declared invalid.

Furthermore, as the district court observed, Pet. App. 38a, "[t]his is also not a situation where the possibility of a veto is abstract or ephemeral, for the Board of Review has already acted to disapprove one resolution passed by the Board of Directors" -- a regulation that would have permitted car pools to use the Dulles Access Road during morning rush hour. J.A. 83-84; *id.* 81-82. The Airports Authority's presumed desire to avoid repetitions of the access road veto, coupled with the Board of Review's actual evaluation and vote on the master plan, J.A. 73-78, create the type of "here-and-now subservience" of the Airports Authority to the Board of Review that this Court concluded made a challenge

to the Comptroller General's authority ripe in *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986). In other words, the mere existence of the veto power has inevitably shaped the Airports Authority's actions and tainted the process by which the master plan was adopted and other decisions have been and will be made.

Finally, withholding judicial review will cause hardship to respondents because they are presently threatened with increased air operations and passenger traffic from the master plan. For all these reasons, this case is ripe for judicial review at this time. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

## II. THE BOARD OF REVIEW IS UNCONSTITUTIONAL.

The Constitution divided "the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. at 951. It is "a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928). Under this doctrine of separation of powers, "it is a breach of the National fundamental law . . . if by law [Congress] attempts to invest itself or its members with either executive power or judicial power." *Buckley v. Valeo*, 424 U.S. at 121-22. The Framers viewed the principle of separation of powers to be "essential to the preservation of liberty."

*The Federalist No. 51* (J. Madison), at 336 (ed. Earle 1937). As this Court has repeatedly recognized, this doctrine serves "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122.

Applying this principle in *Springer*, this Court struck down an arrangement under which members of a territorial legislature served on committees that had the authority to vote the government-owned stock of a government corporation and to appoint the executive officials who ran the corporation. This Court held that "the legislature cannot engraft executive duties upon a legislative office" or a collection of its members. *Id.* at 202. This arrangement violated the doctrine of separation of powers since nothing in that doctrine "suggest[s] that the legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions." *Id.* at 203; see also *Buckley*, 424 U.S. at 138-41 (Appointments Clause bars congressional officers from appointing individuals charged with such functions as rulemaking and enforcing the law). Similarly, in *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court held that the doctrine of separation of powers prohibits a congressional official from carrying out executive functions. As the Court stated, "once Congress makes its choice in enacting legislation, its participation ends." 478 U.S. at 733.

The corollary principle, followed by this Court in *Chadha*, is that Congress must comply with the Bicameralism and Presentment Clauses whenever it takes actions that are legislative in character and effect, i.e., "that ha[ve] the purpose and effect of altering legal rights, duties, and relations of persons . . . outside the Legislative Branch." 462 U.S. at 952. In *Chadha*, this Court struck down a one-House legislative

veto because, once Congress delegates a legislative power to the Executive Branch, it “must abide by its delegation of authority until that delegation is legislatively altered or revoked.” *Id.* at 955.

Like the doctrine of separation of powers, the bicameralism and presentment requirements are designed to guard against arbitrary action and congressional aggrandizement. As the Court observed in *Chadha*:

The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

*Chadha*, 462 U.S. at 951.

In order “to protect the whole people from improvident laws,” *id.*, the doctrine of separation of powers and the Bicameralism and Presentment Clauses establish affirmative limitations on the way that Congress can act, and thus, they do more than simply protect the prerogatives of coordinate branches of the federal government. Moreover, whenever Congress gives itself the power to affect legal rights through extra-constitutional means, it is aggrandizing itself at least theoretically at the expense of the Executive Branch, since the President would normally exercise such retained federal

powers or he would have a qualified veto over Congress’ exercise of its lawmaking powers. See Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U.L. Rev. 62, 67, 70 (1990).

In the federal system, Members of Congress cannot possess authority, other than through the constitutional law-making process, over the adoption of budgets, the issuance of bonds, the promulgation of regulations, the adoption of development plans, or the selection of a chief executive officer. Yet, these are the precise powers exercised by the Board of Review here. As the court of appeals concluded, and no one has disputed, “[t]his authority over key operational decisions is quintessentially executive.” Pet. App. 16a. Accordingly, Members of Congress are authorized to act in these areas only by passing laws in accordance with the constitutional lawmaking process; otherwise, they are barred from exercising such authority under federal law by the doctrine of separation of powers.

It clearly would have been unconstitutional for Congress to give itself or a group of its members such a veto power over airports decisions while the FAA operated the airports. The question in this case is whether the result is different when Congress has required the Airports Authority to establish a congressional Board of Review and to be bound by its veto decisions as a condition of leasing the federal airports.

Federal separation of powers principles constrain the Board of Review for three reasons. First, as demonstrated in Part A below, in mandating the establishment of the Board of Review, Congress retained significant federal authority over the airports, which it delegated to the Board of Review in violation of the Constitution. Second, as shown in Part B

below, regardless of whether the Board of Review is exercising federal or state power, Congress has sufficient control over the Board of Review to make it a congressional agent by virtue of the Board's congressional composition, appointment from lists submitted by the congressional leadership, and committee membership requirements. Third, as discussed in Part C below, even if the Board of Review derives its existence from state law, Congress may not attach a condition to the transfer of federal funds or property that enables Members of Congress to act in contravention of the doctrine of separation of powers and the Bicameralism and Presentment Clauses of the Constitution. Finally, as set forth in Part D, the United States' attempt to save this particular Board of Review condition fails because its proposed distinctions are devoid of any constitutional underpinnings or practical limitations.

*A. The Board of Review's Powers are Federally Retained Powers that Cannot Constitutionally be Exercised by Members of Congress.*

Respondents have never contended that the Constitution prohibits states from appointing Members of Congress to state offices. However, this is not a situation in which Congress transferred the Washington airports to the Airports Authority, without requiring it to establish the Board of Review, and Virginia and the District of Columbia decided, on their own, to subject the Airports Authority's decisions to a veto by individual Members of Congress. In that situation, Congress' federally prescribed role would have ceased once it passed the transfer legislation, and its authority would have been limited to passing new legislation to the extent not foreclosed by the lease with the Airports Authority.

In this case, however, Virginia and the District of Colum-

bia did not decide on their own to establish a congressional review board. Instead, the Board of Review originated in, and is mandated by, federal law. Indeed, the concept of a Board of Review originated long after Virginia and the District of Columbia passed their statutes establishing the Airports Authority in accordance with the Holton Commission's recommendations. Like those recommendations, the original bills passed by Virginia and the District of Columbia and introduced in the Senate and House contained no Board of Review provisions. *See supra* at 4, 6.

Moreover, Congress initially approached the issue as one presenting a stark choice between federal and local control. Thus, the Senate Committee considered, but rejected, the idea of retaining federal control in the FAA, but providing it the funds needed for airport improvements. Senate Report at 2-3. Likewise, the House debated an alternative bill that would have established a federal corporation over which Members of Congress would have had no operational control. *See House Hearings* at 1-3.

It was only after both Houses rejected the clearcut alternative of retaining full federal control that the House turned to the concept of the Board of Review to enable Congress to retain operating control over the airports. Under-scoring its true purpose, the House considered two versions of the Board of Review that would have vested the appointment of its Members directly in the congressional leadership. Neither the United States nor the Airports Authority has disputed that a Board of Review appointed directly by Congress would be anything other than a congressional agent that could not exercise the Board of Review's powers. Congress' attempt to camouflage the Board of Review's congressional parentage by replacing the direct congressional appointment power with the submission of short lists of Members, from

which the Airports Authority must appoint the members of the Board of Review, does not change that result. In both cases, the Board of Review provisions of the Transfer Act (not the laws of Virginia or the District of Columbia) are a blatant attempt to retain congressional control over the operation of the two airports.

The Transfer Act does not merely “describe” or “contemplate” the Board’s creation and composition, as the dissent in the court of appeals suggested, Pet. App. 21a-22a; rather, it prescribes the precise composition and powers of the Board of Review. The Act mandates that “[t]he board of directors *shall* be subject to review of its actions . . . by a Board of Review [that] *shall* be established by the board of directors and *shall* consist of” nine Members of Congress, eight of whom must serve on the committees with oversight over the airports, and all of whom must be nominated by the congressional leadership. 49 U.S.C. App. § 2456(f)(1) (emphasis added). It also requires that the Board of Review be given the power to veto the core decisions, such as adopting budgets, approving master plans, issuing bonds, adopting regulations, and appointing a chief executive officer, that the Airports Authority must make to carry out its mandate. 49 U.S.C. App. § 2456(f)(4). Most importantly, Congress added the “drop-dead” clause that voids the Airports Authority’s major powers if the Board of Review is precluded from exercising its veto. These express terms of the Transfer Act, which are noticeably absent from the Virginia and District of Columbia laws, demonstrate that Congress mandated the creation, and established the powers, of the Board of Review and that it did so to retain congressional control over the airports.

If there were any doubt that the Board of Review is a device for retaining congressional control over the airports, the floor debate on that provision points unequivocally to

Congress’ true intent -- to ensure “continuing congressional review over the major decisions of the new airport authority.” 132 Cong. Rec. at H11,098 (statement of Rep. Lehman). It can be stated no more succinctly than the words of Representative Smith: “Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority . . . We are getting our cake and eating it too. . . . The beauty of the deal is that Congress retains its control without spending a dime.” *Id.* at H1,100.

The other link in the chain is the federal lease, which imposed the Board of Review provisions of the Transfer Act on the Airports Authority. It too states, in mandatory terms, that “the Board of Directors *shall* establish a nine-member Board of Review” and “*shall* appoint” the specified congressional members to it, and “*shall* submit” the actions specified in the Transfer Act to that Board for veto. Lease §§ 13.A & 13.D (Pet. App. 175a, 177a) (emphasis added). In other words, it is the Transfer Act and the federal lease that are the ultimate “but-for” causes of the establishment of the Board of Review. Indeed, if Virginia and the District of Columbia amended their statutes to forbid the Airports Authority from having a Board of Review, the Airports Authority would likely lose its leasehold interest in the airports. *See Bell v. New Jersey*, 461 U.S. 773, 791 (1983).

In order to obtain the lucrative airports and to facilitate the improvements that all agreed were sorely needed, Virginia and the District of Columbia dutifully amended their laws to comply with the federal lease.<sup>7</sup> However, the amended

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<sup>7</sup>The brief of the Commonwealth of Virginia highlights the financial benefits of the airports to the Commonwealth. *See VA Br.* at 5 (airports “provide more than \$3.2 billion in business activity, pay over \$468 million in annual wages and salaries, and

laws do no more than authorize the creation of a board of review, without requiring the Airports Authority to do so, and without specifying its congressional membership or prescribing its veto authority. In addition, neither contains the provision in both the Transfer Act and the lease that essentially guts the Airports Authority's powers if the Board of Review is judicially invalidated. This lack of specificity is in sharp contrast to the Virginia and District of Columbia provisions concerning the Board of Directors, which lay out the powers of that entity in considerable detail.

Based on the way that the Board of Review came into being, the court of appeals correctly concluded that "it is wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny." Pet. App. 12a. To the contrary, "the 'practical consequences' of the current arrangement are to maintain in place by federal law a body composed exclusively of members of Congress that exercises operational control over the airports." *Id.* Since the power of the Board of Review over the Airports Authority is a retained federal power, it must be exercised in accordance with the Constitution. The doctrine of separation of powers and the Bicameralism and Presentment Clauses bar Congress and its Members from exercising

(continued)

generate many millions of dollars in tax revenues to the state and Northern Virginia localities"). Not only have the airports been a net moneymaker, *see supra* at 2 & n.1, but the Transfer Act requires payments of only \$3 million per year in addition to a one-time payment of \$23.6 million for the unfunded pension liabilities of the airports' employees, while the Grace Commission had set a purchase price of \$342 million for the airports. 49 U.S.C. App. § 2454(b); General Accounting Office, *Federal Assets: Information on Completed & Proposed Sales* 10 (1988); Senate Hearings at 56 (statement of Sec'y Dole).

that power without going through the constitutional lawmaking process, which the Board of Review admittedly does not follow.

As the Airports Authority concedes, if the Board of Review wields federal power, then it is "exercising significant authority pursuant to the laws of the United States." Pet. Br. at 21 n.13, quoting *Buckley*, 424 U.S. at 126; see also Pet. App. 10a, 15a-16a. As such, the members of the Board of Review must also be appointed in accordance with the Appointments Clause, which authorizes the President, the courts, and department heads, but not Congress or regional bodies, to make such appointments. U.S. Const. Art. II, § 2, cl. 2. In addition, under the Incompatibility Clause, Art. I, § 6, cl. 2, Members of Congress may not hold any office charged with performing executive functions. The additional affirmative limitations imposed by the Appointments Clause and the Incompatibility Clause reinforce the constraints imposed on Congress by the Bicameralism and Presentment Clauses and give further definition to the doctrine of separation of powers.

In sum, Congress retained significant federal authority over National and Dulles Airports in the Transfer Act's Board of Review provisions. Since such retained federal powers can be exercised only in accordance with the Constitution, Members of Congress cannot constitutionally serve on the Board of Review.

**B. *The Board of Review is a Congressional Agent as a Result of the Control that Congress Continues to Exercise Over its Composition and Appointment.***

Regardless of whether the source of the Board of Review's power is federal or state law, it is a congressional agent by virtue of the control that Congress exercises over its

composition and appointment. First and foremost, the Transfer Act and the federal lease require that the Board of Review consist of nine Members of Congress, eight of whom must serve on the congressional committees that have oversight responsibilities over the Washington airports. The Act and the lease seek to divorce the Members from their congressional role by reciting that the Members serve on the Board of Review “in their individual capacities as representatives of users of the Metropolitan Washington Airports.” 49 U.S.C. App. § 2456(f)(1). However, as this Court recently stated in *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (quoting *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 857 (1986)), “our separation-of-powers analysis does not turn on the labelling of an activity . . . , [r]ather, our inquiry is focused on the ‘unique aspects of the congressional plan at issue and its practical consequences . . . ’”

Under this analysis, the user label does not change the statutory requirement that the Board of Review must consist of Members of Congress, particularly since the user label is not backed up by any statutory mandate that the Members of Congress who serve on the Board of Review must, in fact, be users of the Washington airports. Moreover, the committee membership requirement underscores the congressional rather than personal interests of the Members. As the United States correctly recognizes, “the criterion of committee membership is related to congressional duties, rather than to individual use of the airports,” and as such, it “undermine[s] the contention that they are appointed as individuals.” U.S. Br. at 35 n.20.

The practical consequences that flow from this arrangement are also clear: Congress continues to have virtually complete control over the selection of the particular Members of Congress who will serve on the Board of Review

through two means. First, not only has Congress, through the Transfer Act, disqualified any local Members from service on the Board of Review, but it also determines which of its Members will serve on the relevant transportation and appropriation committees from which eight of the nine Board of Review members must be drawn. Since the Board of Review must “consist of” eight members of those committees, Congress can make a Member of Congress ineligible to continue serving on the Board by changing that Member’s committee assignments. In this way, even if the Board of Directors has the power to remove members of the Board of Review, as it claims, the committee membership requirements give Congress a *de facto* removal power over Board of Review members, as the court of appeals concluded. Pet. App. 18a.<sup>8</sup>

Second, the congressional leadership decides which Members of Congress will be included on the lists submitted to the Airports Authority for appointment to the Board of Review. There is no statutory requirement that Congress submit more names than the available slots, and in practice, the lists have left the Airports Authority little choice. Thus, the Speaker *pro tempore* of the Senate submitted only four names for the initial four Senate positions, and the Speaker of the House submitted only six names for the four House slots, and only one name for the alternating slot. J.A. 44-45.

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<sup>8</sup>To the extent that the lease conflicts with the statute by requiring only that the Board of Directors “appoint” the specified Members of Congress to the Board of Review, rather than requiring that the Board of Review “shall consist of” such Members, compare Lease, § 13A (App. 175a) with 49 U.S.C. App. § 2456(f)(1), the statute would control since it allows a lease only with an Airports Authority created in accordance with the requirements of the Transfer Act. See 49 U.S.C. App. §§ 2453(2), 2454(a).

Interestingly, the Speaker confined the House list largely to Members who had voiced significant opposition to local control of the airports. J.A. 44-45; see House Hearings at 1-3 (statements of Chairman Mineta and Rep. Hammerschmidt); 132 Cong. Rec. H11,098, H11,105, H11,106 (statements of Reps. Lehman, Coughlin, Conte, Hammerschmidt). Moreover, the Speaker included the names of the Chairpersons of the pertinent oversight subcommittees, whom the Airports Authority apparently decided that it could not refuse. J.A. 44-45; 1987 Congressional Staff Directory at 419 (Rep. Lehman, Chair of Appropriations Subcommittee on Transportation), 456 (Rep. Mineta, Chair of Public Works and Transportation Subcommittee on Aviation). In other words, Congress can essentially preselect the Board of Review by dictating which Members of Congress are eligible to serve and which are presented to the Airports Authority for formal appointment.

The Airports Authority suggests that in *Mistretta* and *Bowsher* this Court upheld list limitations comparable to that at issue here, Pet. Br. at 24, but, in those cases, the parties never challenged the list limitations, and this Court never addressed their validity. Moreover, those list limitations are inapposite because the President was required only to consider the lists submitted to him, while the Airports Authority's Board of Directors must make its appointments from the lists provided by the congressional leadership. Thus, the Sentencing Reform Act directs the President to appoint three federal judges "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." 28 U.S.C. § 991(a). Similarly, 31 U.S.C. § 703(a) states only that a commission composed of congressional officials shall "recommend" at least three individuals for selection as Comptroller General, and expressly provides that the President may ask the commission to recommend additional individuals. Thus, the President is not obligated to make his appoint-

ments to the Sentencing Commission and to the position of Comptroller General from the lists provided to him, but the Airports Authority has no discretion to depart from the lists submitted by the congressional leadership.

In contending that the Board of Review owes its allegiance to the Board of Directors because that Board appoints and has the power to remove the Board of Review's members, the Airports Authority and United States overlook the virtual dominance that Congress has over appointment and removal of the Board of Review members, which makes the Board of Directors' appointment powers no more than perfunctory or ceremonial. More importantly, the appointment and removal powers are primarily indicia of control that do not overcome the fact that it is the Board of Review that has ultimate power over the Board of Directors and not the other way around. The role of the Board of Directors in choosing from among eligible and listed Members of Congress does not change its "here-and-now subservience" to the Board of Review. *Bowsher*, 478 U.S. at 727 n.5. It is precisely that subservience that makes the Board of Review an agent of Congress, cannot constitutionally carry out the powers assigned to it under the Transfer Act. Cf. *Mistretta*, 488 U.S. at 393 (Sentencing Commission upheld in part because it "is not controlled by or accountable to members of the Judicial Branch.")

#### C. Congress May Not Condition a Grant of Federal Funds or Property on an Agreement to Give Agents of Congress Extra-Constitutional Powers.

To avoid these constitutional limitations, petitioners contend that Congress can give itself a veto power simply by making it a condition of a transfer of federal property. While a state's lawful enactment of a federally prescribed law may

ordinarily eliminate objections to the federal requirement, that is not the case with a congressional mandate that uses the state law as a tool to aggrandize Congress. Such a condition violates the federal doctrine of separation of powers even if the congressional agent technically draws its power from the state ratification of the congressional mandate, rather than from that mandate itself.

Petitioners rely on *South Dakota v. Dole*, 483 U.S. 203 (1987), which held, that even if Congress could not establish a national minimum drinking age, it could require the states to raise their drinking ages as a condition of receiving federal funds. However, as the court of appeals correctly concluded, Congress' Spending and Property Clause powers do not permit it "to circumvent the functional constraints placed on it by the Constitution." Pet. App. 14a.

In *Dole*, Congress had no power under Article I, section 8, to legislate a drinking age directly, but it could seek to promote its objectives by offering economic incentives under the Spending Clause to the states, which plainly have such legislative power. Here, there is no lack of federal power over National and Dulles Airports, but the Constitution limits the *method* by which Congress can control the airports to the full legislative process under the Bicameralism and Presentment Clauses. The court of appeals correctly held that Congress cannot evade these limitations by asking other entities to agree to be bound by Congress' extra-constitutional lawmaking as a condition of obtaining federal property or funds. The states cannot be counted on to oppose such efforts because they have no institutional concern for safeguarding the federal doctrine of separation of powers and will be heavily influenced to go along with a congressional role in order to obtain significant federal property or funds. See U.S. Br. at 32 n.19 and *supra* note 7.

In contrast to its position in the court of appeals, Br. at 10, 31-33, the United States now agrees that *Dole* does not save the Board of Review. It properly recognizes that petitioners' extension of *Dole* "would allow Members of Congress to evade the 'carefully crafted restraints' of the Constitution -- to act in an extra-legislative capacity after enacting a statute, and thereby to threaten the Executive Branch's exclusive responsibility for federal executive functions." U.S. Br. at 26, *citing Chadha*. Indeed, if Congress can evade constitutional constraints on its exercise of executive powers, "a massive loophole in the separation of powers requirement would be opened." U.S. Br. at 31.

The United States correctly perceives that the position urged by petitioners would have ramifications far beyond this case. If upheld, Congress could give itself a veto over the operation of virtually all federal properties, ranging from the national parks to veterans hospitals, simply by transferring those properties to local governments or private entities with a supervisory board of review composed of Members of Congress. There would also be no bar to transferring numerous federal programs, such as those run by the National Endowment for the Arts or the Legal Services Corporation, to the states or private entities, and using the Spending Clause to compel those entities to subject their decisions to the dictates of a congressional review board, committee, or a single House of Congress. In essence, the Board of Review provisions here provide a blueprint for evading the structural limits imposed on Congress by the Constitution whenever federal property or money is involved.

#### D. No Unique Circumstances Save this Board of Review.

Recognizing the "substantial threat of congressional aggrandizement and incursion on the Executive Branch" that

such arrangements pose, the United States contends that in most instances such conditions would violate separation of powers principles. U.S. Br. at 12, 26, 38. According to the United States, such a condition is constitutional here only because there is a “reasonable basis” for appointing Members of Congress to the Board of Review in their individual capacities, operating airports is not generally a federal responsibility, and the Executive Branch has not objected to this arrangement. U.S. Br. at 33-38. This strained attempt to save the Board of Review fails because it has no constitutional underpinnings or practical limitations.

Neither the doctrine of separation of powers nor the Constitution’s bicameralism and presentment requirements dissipate when there is a “reasonable basis” for Congress (not Virginia or the District of Columbia) to deviate from these requirements. This Court has previously rejected similar attempts to evade the structural limits of the Constitution based on policy arguments or any claimed authority under the Necessary and Proper Clause. *See Chadha*, 462 U.S. at 945; *Buckley*, 424 U.S. 138-39.

Not only does this “reasonable basis” test lack any constitutional foundation, but it also could be manipulated to apply to virtually any action taken under the Spending or Property Clauses. Thus, the United States finds a “reasonable basis” for Members of Congress to oversee the airports because Members use the airports regularly to commute between their districts and Washington D.C., and because they have an interest in ensuring that their constituents can travel easily to the Nation’s capitol. *Id.* at 33-34. Recognizing that a similar “reasonable basis” could be articulated for giving Members of Congress a veto over any institutions or services that Members use as individuals, such as social security, health care, education, and roads, the United States

postulates that Members of Congress have a “special and distinctive relationship” with the Washington airports that differs from the interests of the general public. U.S. Br. at 33.

Members of Congress also have a special interest in state laws concerning political parties, primaries, and the hours and conduct of elections. Members of Congress also have a distinctive interest in postal operations, particularly those pertaining to their franking privileges. They could make a case that they have a special interest in state public utility commissions because telephone rates affect their ability to serve their constituents. Moreover, since Members of Congress reside in Washington D.C. when Congress is in session, they could claim a distinctive interest in the Metrorail system, the National Zoo, Rock Creek Park, and virtually every other governmental activity in the District. Their interest in these matters is magnified because their constituents, both those who arrive by air and those who arrive by other means, use city services and visit national sites when they tour the Nation’s capitol.

Even where all Members of Congress cannot claim a special or distinctive interest in federal property or a federally funded program, groups of Members may have such an interest. Thus, those Members of Congress who have served in the armed forces have a special interest in veterans hospitals. Members from jurisdictions close to Washington, D.C. may travel by train to their districts, and thus they (or their constituents) may have a distinctive interest in AMTRAK. An Arizona Senator may have a special interest in Grand Canyon National Park because he regularly visits the park or because it plays such an important role in the state’s economy. Indeed, particular Senators or Representatives may have such strong personal interests in the arts that they could make a case for a veto power over grants award by the

National Endowment for the Arts. In short, there is no limiting principle to the “reasonable basis” test proposed by the United States.

The appointment of Members of Congress as representatives of airport users lacks a “reasonable basis” for three additional reasons. First, the 513 Members of Congress eligible to serve on the Board of Review, Pet. Br. at 22 n.14, are hardly representative of, for example, the more than 15 million passengers who use National Airport each year. Ct. App. 171. They are unlikely to use public transportation to travel to the airports, they generally do not travel with their families or with small children, and they have special privileges, such as designated parking spaces, not shared by the general public.<sup>9</sup>

Second, the Transfer Act and its legislative history destroy the fiction that Congress decided that Members of Congress should serve on the Board of Review because of their ability to represent airport users. Thus, the history is replete with references to the Board of Review as a mechanism for giving Congress control over the airports, and the draft Board of Review provisions reveal such a purpose. *See supra* at 7-12. If Congress were truly searching for a mechanism of ensuring that the operation of the airports would be responsive to user needs, a more logical approach would have been the expansion of the Board of Directors to include nationwide users, as a Senate amendment would have done. Senate Report at 13, 17. Carving out a special role for Members of Congress can hardly be characterized as an

attempt to “guard[] against excessive parochialism” in the operation of the airports. U.S. Br. at 34.

Third, the requirement that eight of the nine Board of Review members must serve on the congressional committees with oversight responsibilities over the airports belies their individual user interest. The knowledge and expertise that Members of Congress acquire in aviation issues as a result of their service on the oversight committees is from their congressional activities not their use of the airports. *See Pet. Br. at 22-23; Va. Br. at 9.* For these reasons, the Board of Review cannot properly be characterized as a group of individual representatives of airport users, rather than an arm of Congress.

There is no basis for permitting Congress to suspend constitutional restrictions on its powers simply because it decides that there is a reasonable basis to do so. Moreover, even if this were the constitutional rule, there is no such reasonable basis here, because Members of Congress do not, in fact, represent the bulk of airport users, and the real reason they were designated (by Congress) to serve on the Board of Review was to retain congressional control, not to represent users other than themselves.

In attempt to assure the Court that any ruling in this case will have no precedential effect, the United States also contends that the anomaly of federal operation of commercial airports makes congressional aggrandizement under the same model inapplicable in other contexts. U.S. Br. at 35-36. However, it could also be said that it is anomalous for the federal government to operate hospitals, historic sites, railroads, postal operations, flood control operations, and power plants. The same could also be said about federal programs, such as those concerning legal services, health care, educa-

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<sup>9</sup>The statement about congressional use of the airports quoted by the United States in its brief at page 33 was made by the Secretary of Transportation in support of the transfer bill when it had no Board of Review provisions. House Hearings at 110.

tion loans, food stamps, and mortgage insurance, at least prior to the time that the federal government became heavily involved in such matters. Once again, this factor offers no limiting principle.

Finally, the Executive Branch suggests that its assent to the Board of Review provisions supports their constitutionality. U.S. Br. at 36-38. Clearly, the Executive Branch cannot modify the Constitution by agreeing to a violation of its provisions. If that were the case, this Court would not have needed to reach the merits of the challenges in *Mistretta v. United States*, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), since the Executive Branch supported the statutes at issue in those cases. Indeed, in *Chadha*, this Court stated that "[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." 462 U.S. at 942 n.13. The doctrine of separation of powers is designed principally to protect the people from governmental overreaching, and not to protect the prerogatives of the Executive Branch. For this reason, the assent of the Executive Branch and obviously that of Congress -- the beneficiary of the aggrandizement of power by the Board of Review -- cannot override the requirements of the Constitution.

### **CONCLUSION**

For the reasons set forth above, the Court should affirm the judgment below.

Respectfully submitted,

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March 29, 1991

Supreme Court, U.S.  
FILED  
APR 9 1991

No. 90-906

(10)

THE CLERK

In the Supreme Court of the United States  
OCTOBER TERM, 1990

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METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE UNITED STATES

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OCTOBER TERM, 1990

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No. 90-906

METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF  
AIRCRAFT NOISE, INC., ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE UNITED STATES

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In their brief, respondents attempt to ride two horses at once. First, they argue (Br. 28-33) that the Board of Review is exercising purely *federal* authority and that the constitutionality of the Board must be determined on that basis. But this attempt to defend the rationale of the court of appeals is half-hearted at best; as suggested in our opening brief (at 30), this rationale, if accepted, would call into question the constitutionality not only of the Board of Review but also of the Airports Authority itself and of many other comparable state and multi-state agencies.

Second, respondents argue that even if the Board of Review's authority derives from state law, the

Board's constitutionality cannot be sustained. Br. 33-39. But in doing so, respondents fail to accord sufficient respect to the exercise of state authority, fail to give adequate recognition to the unusual circumstances of this case, and fail to explain how, in these circumstances, the vital principle of separation of powers is threatened or undermined.

1. Respondents make a number of incorrect assertions and arguments about the structure of the Airports Act and about the scope of the Airports Authority's role and powers. First, in support of their argument that the Board of Review exercises federal power, respondents suggest (Br. 30) that the Airports Act "mandates" the creation of the Board. Yet that is precisely what the Act does not do, any more than the Act mandates the creation of an Airports Authority or mandates the execution of a lease of federal property to that Authority. The clear import of the Act is that *if* the legislatures of Virginia and the District of Columbia create an Airports Authority having certain powers, and *if* that Authority's actions in certain respects are subject to review by a Board of Review having certain characteristics, then the Secretary of Transportation *may* enter into a lease containing certain provisions. See 49 U.S.C. App. 2454-2456. Thus, creation of the Board of Review is a condition of the lease, just as a state-created rule on the legal drinking age was a condition of federal aid in *South Dakota v. Dole*, 483 U.S. 203 (1987).

Second, respondents err in attempting to attach significance to what they pejoratively characterize (*e.g.*, Br. 14, 30) as a "drop-dead" clause—the provision in Section 2456(h) that, if the Board of Review is unable to carry out its functions by reason of a judicial order, then the actions subject to its

review under the Act may not be performed. This is, purely and simply, a non-severability clause, which makes explicit Congress's intention that the existence of the Board of Review is a condition essential to the exercise of certain powers by the Authority. That Congress regarded the Board as essential in this respect is of no moment in appraising the constitutionality of the Board itself. It goes only to the appropriate remedy in the event that the Board is held to be unconstitutional. See generally *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-686 (1987); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234-235 (1932).

Third, in an effort to denigrate the power of the Authority, respondents argue (Br. 34-37) that Congress has "*de facto*" power to remove members of the Board of Review by virtue of its power to relieve those members of their congressional committee assignments, and that the Authority *must* make appointments from the initial lists furnished to it by the Speaker of the House and President pro tempore of the Senate. We believe that neither of these assertions is correct.

With respect to the alleged "*de facto*" removal power, respondents rely almost entirely on the use of the word "consist" in the description of the Board of Review in Section 2456(f)(1). But a reading of the entire section leaves no doubt that the term is used in the context of appointment, and indeed paragraph (f)(2), in describing the terms of Board of Review members, refers to them as "Members \* \* \* appointed" under paragraph (f)(1) (emphasis added). Moreover, the use of the term "consist" in this sense is by no means unusual. For example, the statute on the Legal Services Corporation, 42 U.S.C. 2996c(a), refers to the Corporation's Board of Directors as

"consisting of eleven voting members appointed by the President, by and with the advice and consent of the Senate, no more than six of whom shall be of the same political party." Clearly there, as here, the qualifications stated are qualifications for appointment. Whether one who ceases to have these qualifications is subject to removal is a question to be considered in the first instance by the body that has the power of removal. And in this case, for reasons stated in our opening brief (at 31 n.18), we believe that this removal power rests squarely and exclusively with the Airports Authority itself.

With respects to the Airports Authority's discretion to reject all the candidates on an original list, or to ask for a different or expanded list, the statute itself is silent. The Authority has assumed it has that power, even though it chose not to exercise it when the original lists were submitted to it. See J.A. 57; see also J.A. 34-35. And since the power of appointment under the statute plainly does reside in the Authority and not in Congress under Section 2456(f)(1), the most reasonable construction of the statute is that the Authority may insist on a different or expanded list of nominees. Moreover, as with the question of removal, any ambiguities in the statute should be resolved in a way that minimizes or eliminates constitutional difficulties. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 682 (1988).

2. Respondents argue (Br. 28-33) that the powers of the Board of Review are "federally retained powers." If respondents were correct that the Board of Review is exercising federal authority, then we would agree that the Board's existence cannot be squared with separation of powers principles or indeed with the specific requirements of bicameralism and presentment, the specific requirements of the Appointment Clause, or the specific prohibitions of the

Incompatibility and Ineligibility Clauses. See Gov't Br. 24-26. But respondents' attempt in this part of their brief to defend not only the result reached by the court below, but also the majority's rationale, is half-hearted and unavailing. As explained in our opening brief (at 29-31), the Authority derives its powers not from Congress but from the joint action of Virginia and the District of Columbia. This is not "federal" power; it is power derived from state and local sources to administer federally leased property pursuant to federal consent. Moreover, respondents never suggest, nor do they even attempt to explain, how the Authority itself (or any comparable state or multi-state agency) could survive constitutional challenge if the court of appeals' rationale is correct. The conditions imposed by Congress in the Airports Act were just as detailed with respect to the Authority as they were with respect to the Board of Review, if not more so. And if the Authority is exercising federal power as a result, presumably all of its members except the one appointed by the President have been named to office in violation of the Appointments Clause.<sup>1</sup>

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<sup>1</sup> Respondents rely heavily on the fact that, in their view, the concept of the Board of Review "originated" in Congress, rather than in Virginia or the District. See, e.g., Br. 29. They do not, however, make clear whether they regard the origin of the concept as constitutionally decisive. If the contention is that constitutional validity turns on who had the idea first, it is a bizarre suggestion—surely the constitutional analysis would not be appreciably different if the Governor of Virginia had suggested the Board of Review, Virginia and the District of Columbia had included it in their original statutes, and Congress had then enacted precisely the same Airports Act. And, if respondents' contention is not to that effect, their emphasis on the "origin" of the idea is entirely irrelevant.

Respondents also suggest that the Board functions as an "agent" of Congress. Br. 33-37. This assertion rests, in large

3. Once the underbrush is cleared, the question is properly focused: Whether the exercise of power by joint action of Virginia and the District of Columbia—pursuant to which the Board of Review was established—passes constitutional muster. As respondents acknowledge (Br. 19, 28), it clearly would withstand challenge if the Board of Review had been created by Virginia and the District of Columbia in the absence of a federal statute. The question of constitutionality is posed because the requirement of a Board of Review was included in the Airports Act as a condition of the lease. But in arguing that the Board of Review cannot stand, respondents seriously underestimate the significance of the unusual circumstances of this case, and thus fail to give any content to the alleged threat to separation of powers principles.

a. Respondents assert (Br. 40) that our emphasis on the special circumstances of this case “lack[s] any constitutional foundation.” This assertion puts the shoe on the wrong foot. Since the case involves the exercise of non-federal power in creating the Board of Review, there is no basis for finding a violation of any specific constitutional provision—be it bicameralism, presentment, appointments, incompatibility, or ineligibility. Rather, the question is a different one: whether an arrangement of this sort, which does not violate any specific constitutional prohibition or requirement, offers a device whereby the Legislative

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part, on the mischaracterization of appointment and removal powers (*id.* at 34-37), which is discussed above. If respondents are suggesting that Members of Congress necessarily and automatically serve as agents of Congress because of their status as Members of Congress (*id.* at 33-34), such a contention is flatly inconsistent with the Framers’ considered decision that Members of Congress may simultaneously serve in state offices. See Gov’t Br. 21-23.

Branch may breach the barriers created by separation of powers principles. This question necessarily requires an examination of the circumstances.

b. We have emphasized in our brief that in this case, several conditions we view as necessary to constitutional validity have been met. Two of those conditions—that the Board has been created by non-federal authority and that the creation of the Authority was not “coerced” by Congress<sup>2</sup>—are not questioned by respondents, at least at this point in their argument. But respondents take issue with the third—that both in form and in substance Members of Congress must serve in their capacity as individuals—and argue that it offers no limiting principle. Br. 39-44. In making this contention, respondents misunderstand both the nature of our argument and its application.

The principal reason why this requirement of individual interest must be satisfied both in form and in substance, as it was here, is that, when the requirement is satisfied, it becomes far more difficult to conclude that the Members are acting as delegates of Congress or that the case involves a threat of “legislative” intrusion into the Executive Branch.<sup>3</sup>

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<sup>2</sup> See *South Dakota v. Dole*, 483 U.S. at 211-212; *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>3</sup> Respondents place great weight on certain statements in the legislative history regarding the maintenance of congressional control. Br. 31-32, 42. In addition to the fact that particular remarks in the course of a floor debate should not be the basis for invalidating a statute and that the appropriate focus should be on the structural arrangements created by the statute itself (see Gov’t Br. 34-35 n.20), respondents’ account of the legislative history selectively ignores evidence supporting the role of Members of Congress as representatives of users. See, e.g., 132 Cong. Rec. 32,143 (1986) (Rep. Hammerschmidt) (“A board of review composed of Con-

The statute and the Authority Bylaws contemplate that the Board of Review will represent the users of the airports (49 U.S.C. App. 2456(f)(1); Pet. App. 151a), and the Members are selected as such. J.A. 45, 47; Pet. App. 175a.<sup>4</sup> Indeed, the Act disqualifies from service on the Board those Members whose home districts are so close to Washington that they are the least likely to be frequent users. 49 U.S.C. App. 2456(f)(1).

Respondents do not seriously rebut our argument that the individuals who serve on the Board of Review have a special and distinctive relationship with the airports, which supports their capacity to serve as representatives of users.<sup>5</sup> Rather, the thrust of re-

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gressmen is created to protect the interests of all users of the two airports.”); *id.* at 6069 (Sen. Kassebaum) (“Most Members are intensely interested in the amount of service to and from certain cities, from both National and Dulles.”); *id.* at 6070 (Sen. Danforth) (“I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.”).

<sup>4</sup> Respondents stress that most of the members of the Board of Review are drawn from specified committees. Br. 34, 43. As we explained in our opening brief (at 35 n.20), however, if the service of Members of Congress on the Board of Review as individual users is otherwise valid, the requirement of committee membership is not sufficient to invalidate that role.

<sup>5</sup> Respondents offer only the insubstantial contention that Members of Congress may be unrepresentative because they might not travel to the airports on public transportation, might not have their families with them, and do have reserved congressional parking spaces. Br. 42. In addition to the fact that the first two are speculative, it cannot seriously be maintained that these characteristics are of sufficient weight to disable Members of Congress from serving in the individual capacity specified by the Airports Act and the Authority By-

spondents’ argument is that such a relationship may exist in other settings as well. Significantly, respondents devote almost no attention to any specific perceived evil flowing from *this* particular arrangement and concentrate instead on a parade of horribles that will purportedly arise in subsequent cases.<sup>6</sup>

Respondents’ effort to minimize the distinctive nature of the individual-capacity-and-representation-of-users characterization is unpersuasive on its own terms. Respondents’ examples are inapposite—they involve, for the most part, either situations in which Members of Congress have the same interest as members of the public (such as telephone rates) or those in which Members have a unique interest not shared by the general public at all (such as franking privileges). The singular characteristic of the airports context—which justifies Members’ service in their individual capacities and as representatives of users—is that, on the one hand, they use the airports to a far greater degree than members of the general public, but, on the other hand, they share usage of the airports with the general public. Furthermore, and unlike the ex-

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laws. 49 U.S.C. App. 2456(f)(1); Pet. App. 151a. Respondents also seek to rely on the legislative history and the requirement of committee membership (Br. 42-43), but the fallacies of this reliance have been discussed. Notably, respondents attempt to suggest “a more logical approach” for protecting user needs (*id.* at 42), thereby conceding the validity of the goal itself; whether a particular legislative approach is simply wiser or “more logical” than another is, of course, a question of legislative discretion rather than constitutional command.

<sup>6</sup> Thus, in respondents’ view, the airports arrangement will provide “a blueprint” (Br. 1), “a roadmap” (*id.* at 19), “no limiting principle” (*id.* at 20), and, again, “a blueprint” (*id.* at 39).

amples given by respondents, this shared but intensive quality of the usage is a predictable and inevitable incident of congressional service. Indeed, as we have noted (Br. 34), the interest of individual Members in traveling to and from legislative sessions is the subject of explicit, constitutional recognition and protection (Art. I, § 6, Cl. 1), a fact ignored by respondents and a characteristic not shared by their examples.

In sum, respondents' efforts notwithstanding, the requirement of service in an individual capacity is both significant in its bearing on the case and limited in its scope.

c. Moreover, it is important to recognize, as respondents quite studiously do not, the novelty of this question of the interplay between state authority and federal separation of powers principles.<sup>7</sup> In these circumstances, well-established principles of judicial restraint warrant that the Court should proceed with caution—that it should avoid broad pronouncements attempting to resolve all the cases that might ever arise and that it should focus on whether the alleged evils actually exist in the case at hand.<sup>8</sup>

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<sup>7</sup> As we explained in our opening brief (at 27 n.15), *Springer v. Philippine Islands*, 277 U.S. 189 (1928), which is cited extensively by respondents (Br. 24-25), addresses an entirely different problem—the allocation of authority between branches at the same level of government.

<sup>8</sup> See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) (“[C]onstitutional issues affecting legislation will not be determined \* \* \* in broader terms than are required by the precise facts to which the ruling is to be applied.”); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (this Court “is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of

To this end, we have argued that in the present case, there exist not only certain conditions necessary to constitutional validity but also two additional circumstances of obvious significance: (1) that the statute deals not with a matter in which federal presence in both established and expected but with an area of activity where federal involvement is an anomaly; and (2) that the Executive Branch has from the beginning both supported and participated in the development and evolution of the statutory scheme.

Once again, respondents do not deny the existence of these factors; rather, they make a cryptic and unimpressive effort to denigrate them. Thus, on the point that federal ownership and management of commercial airports are anomalous, respondents simply say (Br. 43-44) that other areas of federal involvement were anomalous before the federal government became involved in them. But surely, the question whether the constitutional prerogative of the Executive Branch is threatened is a question influenced by the history and extent of federal concern; here, Congress and the Executive agreed that federal management and operation of these commercial airports was both incongruous and inappropriate. And on the related point of Executive Branch participation in the formulation and implementation of the statutory scheme, respondents come up only with a non sequitur (*id.* at 44): that the lack of Executive Branch objection does not deprive this Court of the authority to decide the issue if it is properly presented. We agree

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the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied”). See also *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

completely (see Gov't Br. 37), but our point is a more modest one: courts have in the past recognized the significance of the concurrence of the Legislative and Executive Branches on a question involving the separation of powers between them,<sup>9</sup> and this case presents an appropriate occasion for doing so again.<sup>10</sup>

\* \* \* \* \*

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON  
*Acting Solicitor General \**

APRIL 1991

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<sup>9</sup> See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 441, 449 (1977). See also Gov't Br. 37.

<sup>10</sup> We note that respondents incorrectly state that Assistant Attorney General Bolton's analysis of the constitutionality of the Airports Act proposal was "[i]n order to bolster congressional support for the administration's transfer legislation." Br. 8. Respondents may disagree with the Assistant Attorney General's analysis, but there clearly is no basis for attributing ulterior motives to that analysis (which objected to two of the three proposals submitted by Congress), or for concluding that the analysis was anything but a serious, considered, and principled evaluation of the constitutional validity of the proposals. See J.A. 25-35.

\* The Solicitor General is disqualified in this case.

Supreme Court, U.S.

F I L E D

No. 90-906

APR 8 1991

OFFICE OF THE CLERK

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**REPLY BRIEF FOR THE PETITIONERS**

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**REPLY BRIEF FOR THE PETITIONERS**

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**A. THE BOARD OF REVIEW IS EMPOWERED BY STATE LAW.**

1. Respondents in essence urge this Court to adopt an unprecedented theory of origination under which the constitutionality of a nonfederal board established under state law would hinge on whether the state or the federal government originated the idea of how that entity would be structured. Respondents concede that a nonfederal airports authority could conceive of and establish pursuant to state law a Board of Review with disapproval powers and appoint Members of Congress to serve thereon without abridging the Constitution. Brief for Respondents

("Resp. Br.") at 28. The constitutional error in this case, they allege, arises because the idea for the Board of Review, including its composition and powers, originated in Congress and not in the states. *Id.* at 29. But neither the separation of powers doctrine nor any of the myriad other constitutional provisions that respondents invoke turns on who originates the idea for a particular action or entity. If the states have the power to create such a Board on their own, the Constitution does not prohibit their voluntary decision to embrace that idea merely because it originates in Congress. *Cf. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).<sup>1</sup>

The critical question is what public entity actually created and empowered the Board. Respondents acknowledge that Virginia and the District authorized the establishment of a Board of Review (Resp. Br. at 31-32), yet make much of the fact that the Virginia and D.C. legislation did not spell out in detail the Board's composition and powers. *Id.* However, Virginia and the District quite properly delegated to the nonfederal Authority that they had created the responsibility to establish the Board and set forth its composition and powers in Bylaws promulgated pursuant to state law.<sup>2</sup> Those Bylaws require the Authority's Directors to establish a Board of Review and appoint thereto "representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities." Bylaws,

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<sup>1</sup> There is no evidence, and respondents do not suggest, that undue congressional coercion existed here. *See infra* p. 6.

<sup>2</sup> Respondents also ignore critical state action in an area that Virginia and the District could not delegate—the state statutes expressly exempt *both* the Authority's Directors and Board of Review members from personal liability for actions taken in their official capacities. D.C. Law 7-32, § 3(b) (1987) (Pet. App. 142a); 1987 Va. Acts ch. 665, § 4 H (Pet. App. 110a). Respondents are simply incorrect when they state that the Transfer Act makes the Authority's Board of Directors but not the Board of Review liable for the Authority's actions. *See* Resp. Br. at 14.

art. IV, § 1 (Appendix to Petition for A Writ of Certiorari ("Pet. App.") 151a). The Bylaws prescribe how members will be selected from "a list or lists of recommended appointees" provided by the Speaker of the House and the President *pro tempore* of the Senate (*id.* at 152a); they also establish the powers of the Board of Review and prescribe what actions the Authority may pursue if a court were to declare the Board of Review invalid. *Id.* at 152a-154a.<sup>3</sup> Respondents fail even to mention these Bylaws in arguing that the Transfer Act and the Lease are "the ultimate 'but-for' causes of the establishment of the Board of Review." Resp. Br. at 31. Ultimately, without the voluntary actions of Virginia, the District and the nonfederal Authority, which adopted these Bylaws, there would be no Board of Review. *See* Brief for Petitioners ("Pet. Br.") at 17-19.

Because the Board of Review in fact was established, appointed and empowered pursuant to the laws of Virginia and the District, there is simply no basis for respondents' contention that it exercises "retained federal power." Resp. Br. at 32. States often accept conditions that originate in Congress, but this does not federalize the state action. It clearly was not Congress' intent, as expressed in the plain language of the Transfer Act (49

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<sup>3</sup> Respondents suggest that the Transfer Act provision describing how the Lease should circumscribe the Authority's ability to initiate certain major actions if the Board of Review were held invalid (*see* 49 U.S.C. app. § 2456(f)) indicates impermissible congressional control over the local airports. Resp. Br. at 30. Respondents misconstrue the purpose and effect of § 2456(f), which simply makes clear how the Airports Authority is to function prospectively—and preserve the desired balance between local and user interests—if the Lease conditions (and provisions in the Bylaws) setting forth the Board of Review's composition and powers were invalidated. Congress should be commended for eliminating the need for this Court to undertake the "elusive inquiry" as to whether Congress intended its authorization for the remainder of the Lease provisions to stand or whether a workable administrative mechanism would remain if a particular provision were severed. *See INS v. Chadha*, 462 U.S. 919, 932, 934 (1983).

'U.S.C. app. § 2456(a) and (b)(1) (1988)), to federalize any aspect of the Authority's governing structure. Nor was this the intent of the federal Executive or the legislative and executive branches of the governments of Virginia and the District, when they authorized the governing structure ultimately implemented by the Authority. See Lease, art. 11.A. (Pet. App. 171a); 1985 Va. Acts ch. 598, § 2 (Pet. App. 89a); D.C. Law 6-67, § 3 (1985) (Pet. App. 122a).

2. Contrary to respondents' contention that it is irrelevant whether the Board of Review exercises federal or state power (Resp. Br. at 29, 33), it is indeed significant that the Board of Review's powers are non-federal. As a creature of state and local law (see Pet. Br. at 17-19; Brief for the United States ("U.S. Br.") at 21, 27-28), its actions, if any, affect only the non-federal Authority's Board of Directors' state-derived powers with respect to the operations of two metropolitan airports. Thus, the Board of Review is without power to trench on the functions assigned to the federal Executive by the Constitution<sup>4</sup> and federal separation of powers concerns are not implicated by the Board's non-federal activity whether characterized as executive or not. See *Kwai Chiu Yuen v. INS*, 406 F.2d 499, 501 (9th Cir.), cert. denied, 395 U.S. 908 (1969).

3. Respondents belabor the chronology and evolution of the Transfer Act in an attempt to show that what Congress in fact did was "camouflage" some underlying sinister intent. Resp. Br. at 2-13, 29. This history, however, more appropriately can be described as evidence of Con-

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<sup>4</sup> There has been no allegation—nor could there be—that Congress impermissibly interfered with the federal Executive branch's responsibility to negotiate a Lease for the transfer of the two airports to the nonfederal Authority (see 49 U.S.C. app. § 2454(d) (1988)) or to perform such other duties with respect to these and other airports nationwide as authorized by federal statutes. The federal Executive retains unencumbered its powers with respect to airports generally.

gress' diligent effort, acting with full awareness of this Court's separation of powers decisions and even seeking the advice of the Executive branch (see Joint Appendix ("J.A.") 25-35), to choose a constitutionally appropriate way to balance local and airport user interests in solving a complex regional transportation issue.

Respondents ironically would have this Court ignore the plain language of the Act itself which was duly enacted in accordance with the Presentment and Bicameralism Clauses and makes clear that Review Board members are to serve in their individual not congressional capacities as representatives of the airport users. 49 U.S.C. app. § 2456(f)(1) (1988). Instead, respondents seek to divine from selected statements by individual Members in a late-night debate a furtive congressional intent to control the airports. Resp. Br. at 30-31. Faithful adherence to separation of powers principles would dictate a construction of the law as it was enacted and not as individual members might choose to portray it. See *Regan v. Wald*, 468 U.S. 222, 237 (1984); see also *Blanchard v. Bergeron*, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring). Moreover, this Court has long recognized that judicial inquiry into legislative motive is not appropriate. See *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) ("a court has no license to psychoanalyze the legislators") (citation omitted).

When the rhetoric is brushed aside, the reality is that the interests that Congress sought to protect were airport user interests which Members as individuals understand by virtue of their frequent use of the airports. See, e.g., Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040 and S. 1017 before Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 99th Cong., 2d Sess. 110 (1986) ("Members of Congress are heavy users of

the air transportation system. Your busy schedules include many trips back to your districts.") (statement of Secretary Dole). Members of the transportation-related committees are particularly knowledgeable and experienced in dealing with airport user concerns and thus were logical candidates to represent airport users. This unique user-representation can be readily distinguished from Congress' federal legislative role, which it has never relinquished, in overseeing airport safety, security, grants and air traffic control.

4. Notably absent from respondents' arguments is any suggestion that Virginia and the District were coerced or compelled to accept these airports. At most respondents suggest that Virginia found acceptance of the airports attractive because of the benefits that would accrue to the Commonwealth from capital improvements that the federal government simply was unwilling to make. Resp. Br. at 31.<sup>5</sup> Such improvements, however, were not guaranteed, and would depend on good management and substantial nonfederal financing. Contrary to respondents' contentions (see Resp. Br. at 2 & n.1), the airports are not profitmaking; airport revenues are to be expended only for capital and operating costs. 49 U.S.C. app. § 2454(c)(3) (1988); Lease, art. 11.C (Pet. App. 171a-172a). Moreover, the Authority, its operations and airport lands are all exempt from state and local taxes. 1985 Va. Acts ch. 598, § 21 (Pet. App. 103a-104a); D.C. Law 6-67, § 22 (1985) (Pet. App. 137a).

#### **B. CONGRESS DOES NOT CONTROL THE BOARD OF REVIEW.**

1. Contrary to respondents' bare assertions (see Resp. Br. at 34-35), Congress does not control the selection or removal of the members of the Board of Review. The

<sup>5</sup> Of course, even under federal ownership, Virginia already enjoyed many of the benefits that accrue to a state from the location of an airport within its boundaries. Such continuing benefits would not have been an inducement for accepting transfer of the airports.

Airports Authority appoints the members of the Board of Review. Lease, art. 13.A (Pet. App. 175a-176a); Bylaws, art. IV, § 1 (Pet. App. 151a-152a). Neither Congress' role in determining the 105 House members and 47 Senators who serve on the relevant transportation and appropriations committees from which the Airports Authority ultimately selects most of the Board of Review members nor the congressional leadership's submission of nominating lists to the Authority undermines this undisputed fact. That the Airports Authority makes its appointments from lists of nominees proposed by Congress does not vest the power of selection in Congress. See *Mistretta v. United States*, 488 U.S. 361, 410 n.31 (1989). Indeed, respondents point to no instances in which congressional limitations on the executive's power of appointment (as opposed to wholesale usurpation of that power by a coequal legislature) have been found to be unconstitutional.<sup>6</sup>

Respondents strain to distinguish the appointment procedure in this case from the procedures for appointing the Comptroller General and the members of the Sentencing Commission. Resp. Br. at 36-37. Respondents' effort fails, however, because they never address, much less dispute, the common theme in all these procedures: as long as the appointment process leaves room for the exercise of "judgment and will" by the appointing authority, such a process is constitutional. See 13 Op. Att'y Gen. 516 (1871). Similar to the President's role in appointing the Comptroller General or members of the Sentencing Commission, the Authority's Board of Directors

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<sup>6</sup> In many instances Congress circumscribes the federal Executive's appointment power: by prescribing specific qualifications for appointment to federal office, see, e.g., 28 U.S.C. § 45 (1988); by providing that appointments must be bipartisan, see, e.g., 42 U.S.C. § 2996c(a) (1988); or by limiting the appointing authority to selection from a nominating list. See, e.g., 42 U.S.C. § 10703 (1988); see Pet. Br. at 24. Such conditions are certainly no less constitutional when a nonfederal authority's appointment power is at issue.

exercises sufficient will and judgment in appointing the Board of Review members. The Authority has the discretion to ask for additional names should no names on the nominating lists be suitable. *See J.A.* 57. Moreover, the Airports Authority has exercised its discretion in selecting the Board of Review, initially appointing four members from a list of six House members and most recently choosing not to reappoint the President *pro tempore* of the Senate whose name was one of two submitted to the Authority. *See J.A.* 44-45; Minutes of MWAA Board of Directors Meeting of August 2, 1989.

2. The power to remove Board of Review members also rests with the Airports Authority and not Congress. Respondents have conceded as much (*see Brief for Appellants* (December 1, 1989) at 35 and *Resp. Br.* at 35) and cannot negate the longstanding precedent and state law that repose removal power in the appointing authority. *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *see Pet. Br.* at 26-27. Respondents belatedly suggest that Congress retains *de facto* removal power over the Board of Review by virtue of its ability to change Members' committee assignments. *Resp. Br.* at 35. This theory, never before argued, rests on certain "consist of" language in the Transfer Act that does not appear in the Lease, which was reviewed by Congress (*see 49 U.S.C. app. § 2454(d)* (1988)), or in the Bylaws, which govern the Authority.<sup>7</sup> But there is nothing magical about

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<sup>7</sup> Respondents have not previously claimed that the Lease may be invalid to the extent that it differs from the Transfer Act. Such a claim would be difficult to sustain because the Act itself merely requires that the Lease contain certain minimum terms "consistent with" the Act. 49 U.S.C. app. §§ 2453(2), 2454(c)(11) (1988). The more precise requirement in the Lease and the Bylaws that the "Board of Directors shall appoint members from certain congressional committees (Lease, art. 13.A (Pet. App. 175a); Bylaws, art. IV, § 1 (Pet. App. 152a)) is not inconsistent with the ambiguous "consist of" language. In any event, Congress had the opportunity to review the Lease for a 30-day period before it became effective

the "consist of" language that suggests, much less mandates, that any change in the congressional committee status of a Board of Review member destroys that member's ability to finish his or her Board term. Indeed, the Transfer Act indicates that there is no necessary relationship between Board of Review membership and continued committee membership—the Act provides for six-year Board terms (*id. at § 2456(e)(3)*) even though House Members are elected to office for only two years. Where Congress has specifically intended an appointment of a Member of Congress to a board or commission to coincide with the Member's term of office, it has so provided in express terms. *See, e.g.*, 20 U.S.C. § 43 (1988) ("The Senators so appointed [to the Smithsonian Board of Regents] shall serve during the term for which they shall hold, without reelection, their office as Senators."); 40 U.S.C. § 176 (1988) ("The Speaker shall continue a member of the commission in control of [the House Office Building] until his successor as speaker is elected or his term as a Representative in Congress shall have expired.").

#### C. RESPONDENTS FAIL TO SHOW WHY CONGRESS COULD NOT ACHIEVE ITS OBJECTIVES FOR THE AIRPORTS THROUGH ITS PROPERTY CLAUSE POWERS.

1. Respondents concede that "a state's lawful enactment of a federally prescribed law may ordinarily eliminate objections to the federal requirement." *Resp. Br.* at 37-38. To this extent, respondents acknowledge this Court's rule that Congress, when acting under its Spending or Property Clause powers, may impose conditions on the states that cause the states to achieve objectives that

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(*see 49 U.S.C. app. § 2454(d)*) and did not voice any concerns. Moreover, since the Transfer Act itself provides for the enforcement of the Lease, not the statutory provisions (*id. at § 2454(e)*), the language of the Lease provisions should be dispositive, contrary to respondents' suggestion. *Resp. Br.* at 35 n.8.

Congress is unable to achieve directly. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). Nevertheless, respondents attempt to create an exception to this general rule when the separation of powers doctrine is implicated, arguing that unlike the federal Executive the states “have no institutional concern for safeguarding the federal doctrine of separation of powers.” Resp. Br. at 38. But there is no basis for such an unusual exception, particularly here where the federal Executive negotiated the Lease incorporating the condition for the Board of Review and has consistently supported the constitutionality of that Board.

Respondents resort to a special exception argument because the condition here satisfies the principled limits that this Court has placed on Congress’ powers under the Property or Spending Clauses. *South Dakota*, 483 U.S. 203. Under these principles, Congress may not encourage the states to undertake activities that the states are constitutionally barred from performing (*id.* at 210-11) and may not unduly coerce the states into accepting a condition. *Id.* at 211. Here, everyone agrees that the Constitution permits states and nonfederal entities to appoint Members of Congress to state or other nonfederal offices (Resp. Br. at 28; U.S. Br. at 21-23; Pet. Br. at 14-15), and there is no evidence or implication of coercion.

Contrary to respondents’ protestations, applying *South Dakota* to this case would not open up a “massive loophole” (Resp. Br. at 39) for circumventing separation of powers constraints. *South Dakota* makes clear “that other constitutional provisions may provide an independent bar” to the federal legislation. 483 U.S. at 208. In this case, the state-authorized structure for establishing and appointing the Board of Review and the unique and limited local airport functions that it performs do not violate any provision of the Constitution. Nor should the constitutionality of this airports structure be held hostage to rampant speculation about other conceivable scenarios

all of which must be tested on their own facts against the principles of *South Dakota* and any independent constitutional provision.

#### D. RESPONDENTS FACE INSURMOUNTABLE BARRIERS TO STANDING.

1. Respondents challenge the Board of Review’s disapproval power in a situation where the Board of Review has not exercised its disapproval power, much less exercised that power to respondents’ detriment. Respondents claim that they are injured by the implementation of a Master Plan for National Airport that the Authority’s Directors adopted, but there is no evidence whatsoever that any action of the Board of Review (or its mere existence) in any way affected that Plan, either before or after its submission to the Board of Review. Thus, respondents have not shown that invalidating the Board of Review would eliminate any cause of harm.<sup>8</sup>

Moreover, even assuming that the Board of Review affected the Master Plan, respondents have not shown that their alleged injuries are “fairly traceable” to the implementation of that Plan. Respondents repeatedly cite (Resp. Br. at 17, 20) the erroneous statement of the district court that increased noise, air pollution and safety problems “could not occur without the significant improvements contemplated by the Plan.” Pet. App. 41a.

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<sup>8</sup> Nor would respondents’ alleged injuries be redressed by invalidating the Board of Review. In seeking to invalidate the Board, respondents hope to trigger the provisions of Article 13.H of the Lease and Article IV, § 9 of the Bylaws that would prevent the Authority from performing actions that must be submitted to the Board of Review. Respondents presumably rely on this circuitous route to reintroduce the issue of National Airport before Congress, even though it previously had rejected respondents’ pleas. The irony is that eliminating the Authority’s power to issue new regulations also would eliminate its power to take action that might benefit respondents. At most, the effect of invalidating the Board of Review on respondents’ claims is far too speculative to support standing. See *Warth v. Seldin*, 422 U.S. 490, 507 (1975).

But the record and respondents' own statements clearly refute this illogical contention. The Master Plan is noise neutral. J.A. 74-75; J.A. 91.<sup>9</sup> Respondents also claim that the Authority cannot "dispute that the Master Plan is a necessary prerequisite for the projected increase in operations at National Airport." Resp. Br. at 21. The Authority can and does dispute exactly that. Respondents confuse the Master Plan itself with airport projections, which are an analytical tool independent of the Master Plan and show increasing passenger growth at National *with or without a master plan*. See J.A. 91. As the record shows, the Master Plan is designed to renovate and rehabilitate airport facilities, not expand capacity.<sup>10</sup>

Recognizing these problems, respondents nevertheless claim that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Buckley v. Valeo*, 424 U.S. 1, 117 (1976). But in contrast to the

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<sup>9</sup> Respondents point out that some gates to be constructed under the Master Plan will accommodate certain widebody aircraft more easily. Resp. Br. at 21. But these widebody aircraft not only are quieter, they also hold more passengers and thus necessitate fewer flight operations, further reducing airport noise. Moreover, whether carriers acquire new aircraft that can meet the nighttime noise standard is completely independent of the Master Plan. See *id.* If some of the new aircraft are widebody, then the same number of passengers can be accommodated with fewer operations, again diminishing airport noise.

<sup>10</sup> Respondents concede that airport capacity is limited by statute. Resp. Br. at 21 n.6; 49 U.S.C. app. § 2458(e) (1988). Thus, even if the Master Plan facilitates more efficient use of the airport during periods of congestion, the statute still prevents additional aircraft operations. The few unused slots in nonpeak hours that respondents point to can be used any time there is market demand for them *with or without the Master Plan*. Respondents also contend that the addition of a taxiway turnoff will increase airport capacity. Resp. Br. at 21. Again, the taxiway will improve efficiency, but it cannot increase capacity which is limited by statute.

Federal Election Commission in *Buckley* that had authority to adjudicate plaintiffs' First Amendment right to make political campaign contributions, the Board of Review has no adjudicatory authority over any personal rights of respondents. Nor has the Board of Review exercised any power affecting the respondents. Since respondents have not even met the traditional threshold test of standing, which requires personal injury *fairly traceable* to the challenged action, see *Allen v. Wright*, 468 U.S. 737, 751, 756-59 (1984), they cannot raise a generalized separation of powers claim merely because the separation of powers doctrine ultimately secures individual rights. *Id.* at 756 n.21; compare *INS v. Chadha*, 462 U.S. at 935-36; cf. *Dennis v. Higgins*, 111 S. Ct. 865, 878 (1991) (Kennedy, J., dissenting). If respondents are allowed to challenge the Board of Review's mere existence (or failure to act in a way that they speculate may have helped them), then virtually anyone has standing to challenge the Board of Review.

2. The cases that respondents and the United States cite to establish that this case is ripe do not support that proposition here. Respondents point to *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), for their claim that since *Chadha* this Court has not waited for a legislative veto to be exercised before reviewing its legality. However there, both parties conceded that the legislative veto at issue was unconstitutional. The sole question presented was a statutory one of severability. See *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985), aff'd sub nom. *Alaska Airlines, Inc. v. Brock*, *supra*. Moreover, that case involved a provision that subjected federal Executive action to congressional veto which, in light of *Chadha*, was plainly unconstitutional. Whether the governing structure of a nonfederal authority charged with local airports operations is subject to separation of powers constraints is a far different question, the resolu-

tion of which should await sufficient concreteness arising from the exercise of the Board's disapproval power.<sup>11</sup>

The United States tries to distinguish this case from *Clark v. Kimmitt*, 431 U.S. 950 (1977), in which this Court summarily affirmed a holding that a challenge to a one-house congressional veto provision was not ripe because the veto had not yet been exercised. *Clark v. Valeo*, 559 F.2d 642, 649 (D.C. Cir. 1977) (*en banc*). The United States finds it significant that the challenge to the legislative veto mechanism in *Clark* arose before Congress' allotted time for exercising its veto had expired, and Congress adjourned without acting. But the United States' claim here—that even when a disapproval power is not exercised the case is ripe—proves too much. If a case is ripe regardless whether the veto is exercised or not, then there is no point in waiting to see how that veto is exercised, as *Clark* suggests. The only answer can be that *Clark* stands for the proposition that if a veto (particularly one involving an issue of first impression) is not exercised, the case is not ripe. See 559 F.2d at 649.

## CONCLUSION

For the reasons stated above and in our opening brief, petitioners respectfully request that this Court reverse the decision below on the merits and uphold the constitutionality of the nonfederal Airports Authority including its Board of Review. In any event, the decision below should be reversed in view of respondents' lack of standing.

Respectfully submitted,

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<sup>11</sup> The one time the Board disapproved an action by the Authority demonstrates the value of a concrete factual context. See Resp. Br. at 23. In that instance the Board disapproved temporarily opening up the Dulles Access Highway to commuters because such action would be "contrary to the interests of the users of the airport." J.A. 83-84. In this specific context—the only time the Board had an acknowledged impact on airport decisionmaking—it is apparent that the Board members were faithful to their obligation under Article IV of the Bylaws to act as representatives of the airport users.

FEB 28 1991

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

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METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, *et al.*,

*Petitioners,*

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT  
NOISE, INC., *et al.*,

*Respondents,*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

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**On Writ Of Certiorari To The United States  
Court Of Appeals For The District Of Columbia**

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**BRIEF OF THE COMMONWEALTH OF VIRGINIA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS CURIAE**

The court of appeals' decision striking down the board of review under federal separation of powers principles overlooks the fact that the board of review derives its power from laws enacted by the Commonwealth of Virginia (the "Commonwealth") and the District of Columbia, which brought into being the Metropolitan Washington Airports Authority (the "Authority"). The creation of the Authority was the culmination of a long history of efforts to remove the airports from direct management and operation by the federal executive.

Prior to the creation of the Authority in 1985, Washington National and Dulles International Airports ("National" and "Dulles," respectively, or the "airports") were the only two air carrier airports in the country owned and operated by the federal government. National began operation in 1941, followed by Dulles in 1962.<sup>1</sup>

With the enactment of the Government Corporation Control Act of 1945, all federal agencies were directed to examine their activities to determine which activities might be more effectively operated as public corporations. An interagency study group determined that National met the criteria necessary for incorporation. Because of ongoing efforts to begin construction of a second airport in the capital area, however, introduction

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<sup>1</sup> For historical background, see Dep't Transp., Fed. Aviation Admin., Metro. Wash. Airports, *History of Past Activity Regarding Organizational and Financial Structure of the Metropolitan Washington Airports, 1945-1984* (1984).

of a bill to effect the incorporation was delayed until 1954. A Senate committee quickly reported the bill favorably, but the same proposal languished in the House. Ultimately, no action was taken on that legislation.

A new bill was introduced in 1959 providing that National and Dulles, then under construction, be incorporated under the aegis of the Federal Aviation Administration. Hearings were held during the succeeding four years, but no bill was ever reported out of committee.

These hearings, however, aired concerns that there should be more comprehensive regional planning for the airport facilities. For that reason, the momentum for mere federal incorporation began to wane. Beginning in 1969, Senators Tydings of Maryland and Spong of Virginia held hearings on the future of the capital area airports in which considerable sentiment was expressed advocating the establishment of a regional airport authority. Senator Spong thereafter introduced a bill authorizing Maryland, Virginia and the District of Columbia to form a multistate authority to operate National and Dulles, with the possible inclusion of Friendship Airport in Baltimore as well. While that bill died in committee for technical reasons, the idea of regional airports ownership remained alive.

In the meantime, the federal budget for fiscal 1972, released on January 29, 1971, contained an entry for sale of the two airports. The budget gave no details, however, as to when, how, to whom, or under what conditions the sale was to occur. Proposals for legislation could not be agreed upon and no sale was consummated.

The struggle to reconcile the national and regional aspects of the airports reached an apex in 1984 when the

federal Secretary of Transportation (the "Secretary") appointed an Advisory Commission on the Reorganization of the Metropolitan Airports (the "Commission"). The Commission, chaired by former Virginia Governor Linwood Holton, recommended that National and Dulles be leased as a unit to an independent regional authority created by the concurrent legislative action of the Commonwealth and the District of Columbia. See S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985) [hereinafter S. Rep. No. 193].

The Commonwealth and the District of Columbia passed legislation creating a regional airport authority to acquire National and Dulles from the federal government. Ch. 598, 1985 Va. Acts 1095, *reprinted in App. 87a* (1990 Term). See also District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67 (App. 119a). The Authority was to be "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction . . . enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia." Ch. 598 § 2, 1985 Va. Acts, *supra*, at 1096 (App. 89a). Further, the Authority was authorized "to acquire from the United States of America, by lease or otherwise," National and Dulles and all their related properties. *Id.* § 3.

President Reagan signed into law the Metropolitan Washington Airports Act of 1986 (the "Transfer Act") in which Congress found that the two airports were an important part of "the commerce, transportation, and economic patterns of the Commonwealth [and] the District of Columbia," that the operation of the airports by

"an independent local agency [would] facilitate timely improvements at both airports," and that "the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation." 49 U.S.C. § 2451(1), (4), (10) (1988), reprinted in App. 60a-61a. The Transfer Act authorized the Secretary to negotiate a long-term lease with the Authority containing minimum terms and conditions as required by Congress. *Id.* § 2454 (App. 64a).

One condition of the lease to be negotiated was the inclusion of a requirement that the nonfederal participants create a board of review representing users of the airports which were to be appointed by the Authority's board of directors from a list of members of Congress. *Id.* § 2456(f) (App. 75a). Although the list was to be provided by the Speaker of the House and the President pro tempore of the Senate, it was the Authority's board of directors which was empowered to choose members for the board of review from that list and, if no suitable candidates were listed, to direct the Speaker and the President pro tempore to submit other names.

Negotiations continued between the Secretary and the Authority and, on March 2, 1987, a lease was agreed upon consistent with both the federal and state legislation. Lease of the Metropolitan Washington Airports Between the United States of America, etc. ("Airports' Lease") (App. 163a). Both the Commonwealth and the District of Columbia then amended their earlier statutes by expressly providing for the board of review as proposed in the lease. Ch. 665 § 5(A)(5), 1987 Va. Acts 1138, 1140 (Reg. Sess.), reprinted in App. 110a-11a; D.C. Law 7-18 § 3(c)(2)(1987), reprinted in App. 140a, 142a-43a.

At the inception of the lease, the capital area comprised the sixth largest passenger market in the United States and the eighth largest in terms of passenger enplanements. At present, businesses at the airports employ more than 21,000 persons (as of June 1, 1990), provide more than \$3.2 billion in business activity, pay over \$468 million in annual wages and salaries, and generate many millions of dollars in tax revenues to the state and Northern Virginia localities (1987 statistics). This is in addition to the enormous economic impact produced by the millions of visitors to the capital area who arrive by way of these airports. The Commonwealth and the District of Columbia created the Authority and entered into the lease without threat or coercion; its arms-length agreement with the federal executive has been, and continues to be, of enormous economic and social benefit to the Commonwealth.

Accordingly, given the potential for disruption of normal operation, planning and development posed by the decision rendered by the court of appeals, the Commonwealth supports the Authority in urging this Court to reverse the court of appeals' decision.

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#### SUMMARY OF ARGUMENT

The respondents created the illusion of a separation of powers problem where none exists by magnifying Congress' limited role in the Authority's creation. The court of appeals' decision reflects an inadequate deference for a political arrangement endorsed by the two political branches of state government. That decision fails

to address whether the state-created political structure of the Authority affects even minimally the dynamic balance of powers between the political branches of federal government.

In prior cases where Congress has been held to have intruded impermissibly on federal executive power, it was clear that Congress, by its own legislative fiat, had directly and substantially diminished the federal executive's power to act effectively in areas of broad national concern.

The Authority, however, had its genesis in the shared desire of the federal executive and state and local interests to relieve the federal government of vexing airport management duties that are commonly performed elsewhere by local or regional authorities. This lawful and appropriate purpose was achieved.

The central condition of the Transfer Act was that the Authority should have only "the powers and jurisdiction . . . conferred upon it . . . by the legislative authority of the Commonwealth of Virginia and the District of Columbia." 49 U.S.C. § 2456(a) (App. 71a-72a).

The Authority's mission is appropriately narrow in scope; it is narrowly constituted "solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area" (*id.* § 2456(b)(2) (App. 72a)), a condition agreed to by the Commonwealth. See, e.g., Ch. 598 § 3, 1985 Va. Acts, *supra* (App. 89a).

Congress did not require a federal transfer of the airports; subject only to certain conditions, Congress left

that decision up to the federal executive. In concluding a lease of the airports with a state-created authority, the federal executive acted in circumstances where its authority is at its maximum. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). In passing mere enabling legislation that permitted without requiring an airport's transfer, Congress acted modestly in an area where its actual power is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

The Commonwealth was not coerced into accepting the board of review, and both the federal lease, which was given Congress' implicit approval, and the Authority's own bylaws provide adequate assurance in accordance with governing state law that members of Congress serving in their individual capacities will exercise the board of review's limited powers solely in the interests of the users of the airports.

The court of appeals based its entire decision upon the weak reed of three words in the Transfer Act (i.e., "shall consist of" (App. 18a)), even though these are not the words the federal executive later chose to use in its practical application of the Transfer Act to the specific terms of the lease. The federal executive's interpretation of the Transfer Act's terms clearly was ignored by the court of appeals when it should have been accorded considerable deference. Congress itself has registered no reservation concerning the lease terms.

Virginia law grants an inherent removal power to an appointing body or official, except where a constitutional or statutory restraint exists. See *McDougal v. Guigon, Judge*, 68 Va. (27 Gratt.) 133 (1876); 1983-1984 Att'y Gen.

Ann. Rep. 91, 92. Accordingly, the Authority's board of directors possesses that power by virtue of being a body subject to the laws of the Commonwealth.

The governance structure of the Authority is one familiar to the Commonwealth. See Va. Code Ann. § 58.1-3713(B) (Supp. 1990).

Whether the Commonwealth seized spontaneously the idea of employing the services of members of Congress is irrelevant to the separation of powers issue. The Commonwealth clearly had the lawful right to employ their services under state law, and the federal constitution does not prohibit such service.

The separation of powers inquiry should address to what extent, if any, Congress has impeded the federal executive in accomplishing its constitutional functions. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). The answer in this case is clearly that the Authority's governance structure has had no such effect. While the proliferation of federal legislative measures akin to the Transfer Act could have implications for the balance of federal political power, it serves no useful purpose to "conjure up hypothetical future cases" in order to decide the instant one. *Youngstown Co.*, 343 U.S. at 597 (Frankfurter, J., concurring). The need for innovation to integrate the "dispersed powers" of government into a "workable" political structure is especially acute where the coordination of the political branches of different sovereign governments is involved. Cf. *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

It was entirely appropriate that the Authority have a review body to reflect more than simply the comparatively parochial interests of the involved regional and local governments, and the expertise of members of Congress suited them for this role. Cf. *Mistretta*, 488 U.S. at 396. ("This is not a case in which judges are given power . . . in an area in which they have no . . . expertise' ".) *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 676 n.13 (1988)).

No appointments clause issue exists here because board of review members do not "'exercis[e] significant authority pursuant to the laws of the United States.'" *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

Respondents resorted to this constitutionally impermissible attack on a state-created political structure in order to destroy it precisely because they cannot demonstrate that this structure has exercised its power in a manner that infringes on their rights. See *Pacific Telephone Co. v. Oregon*, 223 U.S. 118 (1912). Permitting such an attack undermines federalism and is contrary to the deference due a great commercial enterprise sanctioned by the political branches of sovereign governments. Cf. *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).

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## ARGUMENT

### I. Court of Appeals' Application of Separation of Powers Doctrine to State-Created Board of Review Represents Departure from This Court's Separation of Powers Jurisprudence

This is the first time that a body lawfully created under authority of state law has been found violative of the separation of powers doctrine, even though both state and federal law allow its creation. This is, perhaps, also the first time that the level of deference due a political arrangement created independent of the federal government by the voluntary cooperation of both political branches of federal government has failed to secure federal judicial sanction. It is, moreover, one of the few instances, if not the only one, in which an alleged exercise of federal executive power by members of Congress has not been given at least cursory scrutiny to determine whether it even minimally affects the dynamic constitutional balance between the political branches of federal government.

This case contrasts dramatically with the prior cases of this Court relied upon by the court of appeals in holding the board of review unconstitutional. Specifically, the Authority's board of review differs markedly both in its legal origins and in its practical effect on the balance of federal legislative and executive power from other bodies and officials whose powers have been held to intrude impermissibly on federal executive authority.

For example, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), concerned a federal elections commission established by a congressional enactment providing for

members appointed directly by Congress to exercise federal executive rulemaking, adjudicatory and enforcement powers over national presidential elections. This Court held that the commission's members' exercise of federal executive authority meant their appointments must be made in conformity with Article II, § 2, clause 2 of the Constitution of the United States. 424 U.S. at 143.

Similarly, *Bowsher v. Synar*, 478 U.S. 714 (1986), addressed congressional legislation that allocated important federal executive duties regarding the national budget to a legislative branch official subject solely to Congress' removal power. Finding "no escape from the conclusion that, because Congress . . . retained removal authority over the Comptroller General," this Court held that official could not exercise federal executive authority. *Id.* at 732.

*Springer v. Phillipine Islands*, 277 U.S. 189 (1928), involved a national legislative body which, while choosing to retain national ownership of several national corporations, enacted law shifting appointment authority over those corporations' executive officials away from the Philippine chief executive and into the national legislature's own hands. This Court held that the Phillipine legislature could not assume for itself the appointment power of its coordinate and coequal executive branch. *Id.* at 203, 205.

In each of these cases, a national legislature by legislative fiat vested itself with control over national executive bodies and/or officials who were charged with exercising broad national executive power. In each such case, it was apparent that the "hydraulic pressure" of the

legislative branch of a national government had caused it to carve out a national executive role for itself or persons over whom it exercised control that necessarily and directly diminished the national executive's own power.

None of the offending elements present in the prior cases either attended the creation of the board of review or attends today its limited oversight role in the operation of a locally oriented nonfederal authority. The federal component of the airports' transfer legislation had its genesis in the shared desire of the federal executive branch and the state and local interests to divest the federal executive of vexing proprietary duties that had diverted it from its national, and more traditional, executive functions. *See Transfer Act (App. 60a); see also S. Rep. No. 193, supra*, at 12. Both the federal executive and the representatives of important state and regional interests concluded earlier that these proprietary airport duties could be more efficiently performed by a nonfederal local or regional authority similar to those now in use throughout the nation to own and operate its larger airports. *See S. Rep. No. 193, supra*, at 2.

The Transfer Act set minimum conditions for the federal executive's voluntary divestment of airports ownership (i.e., a divestment to be set in motion solely by the federal executive voluntarily negotiating an airport's lease with a nonfederal authority). 49 U.S.C. § 2456(a) (App. 71a). Any lease so negotiated then required the approval of two nonfederal executives (e.g., Ch. 598 § 2, 1985 Va. Acts, *supra* (App. 88a)). The central condition of the Transfer Act was that any authority assuming airports ownership should have, as the Authority does today, only

"the powers and jurisdiction . . . conferred upon it . . . by the legislative authority of the Commonwealth of Virginia and the District of Columbia." 49 U.S.C. § 2456(a) (App. 71a-72a).

The Transfer Act also provided that this state-created authority would have to be "independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the federal government." *Id.* § 2456(b)(1) (App. 72a).

Importantly, as well, the Transfer Act required that the Authority be narrowly constituted, i.e., "solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Washington Metropolitan area." *Id.* § 2456(b)(2) (App. 72a). The Virginia General Assembly and the District of Columbia's legislative body had agreed to this and other conditions. Ch. 598 § 3, 1985 Va. Acts, *supra* (App. 89a).

While respondents have focused narrowly on the Act's requirement of a board of review, as indicated above, the Transfer Act was especially noteworthy for merely authorizing voluntary divestment of action by the federal executive, for its reliance on state legislative initiatives to create the Authority, and for requiring that the Authority not only be independent of the federal government but also narrowly charged to solely operate and improve the airports.

In sum, respondents myopically focused the court of appeals' attention on Congress' legislative role in the airports' divestiture to the virtual exclusion of the more crucial and voluntary roles of both state government political branches and the federal executive branch. This

unbalanced focus on what was Congress' limited and appropriate enabling role created an illusion of a separation of powers issue where more careful analysis would have disclosed none exists. Congress neither sought to effect, nor in fact effected, through its own legislation a transfer of airport ownership and control out of federal executive hands. Moreover, Congress did not require the federal executive to effect the transfer. Accordingly, any effort to cast Congress as the central federal actor in the airports' transfer seriously distorts both legislative and political history.

The federal executive, armed with Congress' enabling Transfer Act, voluntarily pursued lease negotiations that secured the airports' transfer:

When the President [or his delegate] acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held nonconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.

*Youngstown Co.*, 343 U.S. at 635-37 (Jackson, J., concurring) (footnote omitted).

In setting minimum conditions regarding any transfer of airport ownership out of federal hands to be negotiated at the sole option of the federal executive, Congress itself acted modestly within the broad reach of its power under the property clause, a clause which this Court has observed grants "power over the public land thus

entrusted to Congress [that] is without limitations." *Kleppe*, 426 U.S. at 539 (quoting *U.S. v. San Francisco*, 310 U.S. 16, 29 (1940)).

## II. Far from Being Agents of Congress, as Held by Court of Appeals, Members of Board of Review Are Empowered and Charged by Virginia Law to Represent Interests of Airports Users, and in Performing That Function, Are Appointed by, Accountable to, and Removable by, Board of Directors and Not Congress

Only state legislation and jurisdiction created both the Authority and its board of directors independent of the federal government. 49 U.S.C. § 2456(a)-(b)(1) (App. 72a). In turn, it is only the board of directors, no members of which are appointed by Congress, that appoints or vetoes board of review nominees and has the power to remove review board members. The entire purpose of both the Transfer Act and the state legislation creating the Authority, as well as the lease negotiated voluntarily by the federal executive and thereafter approved by non-federal executive authorities, was to permit the federal executive to divest itself of the airports' management and operation. No one can credibly argue that this purpose of federal divestiture was itself unconstitutional, or that it was not accomplished through the federal executive's voluntary lease negotiations.

Respondents attribute an incredible naivete on the part of Virginia's Governor and its General Assembly by implicitly asserting that the Commonwealth merely succeeded in trading federal executive control for federal legislative control of the airports. This was not a

situation, like that presented in *South Dakota v. Dole*, 483 U.S. 203 (1987), where a state may have understandably felt that inducement approached coercion. The Commonwealth was not forced to accept the board of review concept in order to protect an existing stream of federal revenues supporting ongoing state activities. Moreover, the Commonwealth is confident that the Authority's non-federal, state-created board of directors, the sole body empowered to appoint members of the board of review, acted lawfully under state law by providing in its resolutions both for a veto of candidates for review board membership and for the removal for cause of review board members.

The extraordinary conclusion of the court of appeals that Congress has retained the power to remove members of the board of review is not supportable. This conclusion of the court of appeals was based solely on three words of the Transfer Act. The court of appeals reasoned as follows:

The Act specifically requires that the Board 'shall consist of' members of specified committees of the House and Senate. As each house has the right to remove any of its members from any committee at any time, Congress has the power to disqualify any one or more of them from further service on the Board.

(App. 18a). The court of appeals implicitly assumes that the phrase "shall consist of" dictates that continuing House or Senate committee membership following appointment to the board of review shall be a requirement of continuing board of review membership. This assumption is both incorrect and contradicted by the

interpretation previously adopted by the federal executive in the lease itself. It is also inconsistent with the Authority's bylaws, which are the *only* authoritative rules pertaining to this aspect of the Authority's governance.

In examining the court of appeals' incorrect threshold assumption, it is important to emphasize that the Authority's board of review is *not* governed by the Transfer Act but, rather, is governed by the Authority's bylaws and the laws of the Commonwealth. Congress neither undertook to create nor to regulate the Authority through passage of the Transfer Act; rather, Congress merely set forth certain details limiting the federal executive's negotiating latitude in leasing the airport's premises to the Authority.

These conclusions cannot be the subjects of rational dispute. The Transfer Act itself recognizes that the federal interest in the airports is to be protected contractually through a lease negotiated by the federal executive. See 49 U.S.C. § 2451(10) (App. 61a). The federal executive is granted authority to negotiate and enter into a lease, provided the lease is with an authority meeting the description of one contained in the Transfer Act. See *id.* § 2454(a) (App. 64a) (granting authority to lease the premises to the "Airports Authority"); § 2453(2) (App. 62a) (defining "Airports Authority" to be "a public body . . . created [in a manner] consistent with the requirements of section 2456 of this title"). Clearly, the attributes of an "Airports Authority" described by § 2456 are not brought into being by the Transfer Act but, rather, must be established wholly under state law. See *id.*

Moreover, the primary responsibility for assuring that the Commonwealth has created an appropriate

airports authority was left to the federal executive to assess as a necessary incident of its own responsibility to assure that the terms of the Transfer Act were faithfully met through a lease vehicle.

In the lease, the federal executive effectively interpreted the requirements of § 2456(f)(1) differently from the later, mistaken interpretation given it by the court of appeals. Rather than providing that the "Board of Review shall be established by the board of directors and shall consist of" members of certain congressional committees (§ 2456(f)(1) (App. 75a)), the federal executive and the Authority agreed in the lease that "the Board of Directors shall establish a nine-member Board of Review of the Airports Authority and appoint to it representatives of the users" and that the "Board of Directors shall appoint" members from certain congressional committees. Airports' Lease Art. 13, § 13.A (App. 175a) (emphasis added).

The primary role in the protection of federal interests was played by the lease. The only role Congress reserved for itself was providing that no lease may take effect unless it has first been submitted to Congress with an opportunity for it to take responsive action. 49 U.S.C. § 2454(d) (App. 70a). Congress has not been heard to complain. Accordingly, the practical and constitutional interpretation given § 2456(f)(1) by the federal executive charged with executing this law should be respected. (The court of appeals does not appear to have considered this authoritative interpretation, nor was it argued by any party in the court below.)

The Authority carried out its obligations (which were obligations under the lease, not under the Transfer Act) by

promulgating the lease's interpretation of § 2456(f)(1) verbatim as part of the bylaws of the Authority. Bylaws of the Metropolitan Washington Airports Authority ("Bylaws") Art. IV, Sec. 1 (App. 151a-52a).

Even if the court of appeals had found that the federal executive exceeded its authority by leasing property to an authority not meeting the Transfer Act's requirements, that fact would have been relevant only to the issue of whether the lease was an *ultra vires* exercise of federal executive power; it would not make the board of review itself an unconstitutional body.

The Authority and its bylaws are to be construed in accordance with Virginia law. Ch. 598 § 22(A), 1985 Va. Acts, *supra* (App. 104a); D.C. Law 6-67 § 23(a) (1985) (App. 137a). Those bylaws provide that the members of the board of review are to be appointed by the board of directors for six-year terms, though no provision addresses their removal. See Bylaws, *supra* Sec. 2 (App. 152a). Under Virginia law, where a public officer's term is established under law, removal of the officer is governed by Va. Code Ann. § 24.1-79.6 (Repl. Vol. 1985), which provides the exclusive means by which such officers may be removed. See 1983-1984 Rep. Att'y Gen. 466, 468. Removal under that provision requires a petition signed either by the person appointing him or by a majority of the members of the appointing authority. Va. Code Ann. § 24.1-79.6. "This is consistent with the general rule followed in Virginia that the power to appoint an officer inherently carries with it the power to remove the officer unless a constitutional or statutory restraint exists. See *McDougal v. Guigon*, 68 Va. (27 Gratt.) 133 (1876)." 1983-1984 Rep. Att'y Gen. 91, 92.

The governance structure adopted for the Authority is akin to the governance structure of the advisory committee examined in the foregoing official opinion of the Virginia Attorney General. That opinion addressed a "coal road improvement advisory committee" established pursuant to former Va. Code Ann. § 58-266.1:2(B) (now Va. Code Ann. § 58.1-3713(B) (Supp. 1990)). Although the advisory committee exercises some power regarding the governing body's action, the governing body possesses the power to remove at will any committee member it appointed. 1983-1984 Att'y Gen. Ann. Rep., *supra*, at 92. Thus, the check-and-balance roles played by the Authority's board of directors and its board of review are a familiar governance structure for public bodies created under Virginia law.

This removal power, which only the board of directors may lawfully exercise over the board of review, is adequate assurance that members of Congress whom the board of directors appoint and who serve in their individual capacities, are not agents of Congress.

Perhaps the "hydraulic pressure," also present in federal-state relations, dictated that the Commonwealth did not seize spontaneously on the idea of engaging the services of members of Congress. This unremarkable political reality, however, is surely an insufficient basis for judicially dissolving a review body that was lawfully conceived under state law and is not per se violative of the federal constitution. Compare *Kwai Chiu Yuen v. Immigration and Naturalization Service*, 406 F.2d 499 (9th Cir.), cert. denied, 395 U.S. 908 (1969) and *Signorelli v. Evans*, 637 F.2d 853, 862 (1980) with Va. Code Ann. § 2.1-33(8) (Supp. 1990).

### **III. Appointments Clause Has No Application to Case Because Members of Board of Review Are Public Officers of Commonwealth and Are Not "Officers of the United States."**

There is no appointments clause issue presented by this cause because that clause does not prohibit states from creating an authority and appointing its members. As noted above in Part II, the Authority is not governed by the Transfer Act. The Authority is governed by, and draws its life from, state law. Since those members do not "'exercis[e] significant authority pursuant to the laws of the United States,'" they are not "'Officer[s] of the United States.'" *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d at 1365 (quoting *Buckley*, 424 U.S. at 126).

### **IV. Separation of Powers Issue Raised by Citizens Is Illusory; Respondents' Attack, at Its Core, Is Itself Impermissible Attempt to Enlist Federal Judicial Power to Destroy State-Created Public Body's Governance Structure for Purpose of Undermining Way in Which Structure Lawfully Exercised Power**

Where an unconstitutional legislative invasion of federal executive authority is charged, the inquiry is always to what extent the legislation in issue has prevented "the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. at 443. If it is asserted that the congressionally permitted voluntary action of the federal executive that actually divested the latter of two local airports upsets that balance of federal political power, those asserting this view should articulate reasons supporting this assertion. In fact, the effect the governing structure of

the airports has on the proper balance of federal executive and legislative power is well below *de minimis*; it is nil. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986) (where intrusion into powers of federal judicial branch found *de minimis*, no separation of powers problem exists).

The respondents have sought to avoid answering this central issue by hoisting a spectre of Congress later resorting to other similar legislative measures which, they claim, could pose a palpable threat to the proper separation of federal executive and legislative political powers. "While in the abstract a proliferation" of schemes by Congress to devolve federal property on state-created bodies subject to oversight authority of members of Congress might threaten the proper separation of political powers between the political branches of federal government, "that danger is far too remote for consideration here." *Mistretta*, 488 U.S. at 407. This Court has long recognized how "unprofitable . . . it is to conjure up hypothetical future cases" in order to resolve present constitutional issues. *Youngstown Co. v. Sawyer*, 343 U.S. at 597 (Frankfurter, J., concurring). Moreover, the board of directors' removal-for-cause power, a power not inconsistent with the lease terms, should be seen as "specifically crafted to prevent" Congress itself "from exercising 'coercive influence' over" this nonfederal independent political subdivision. *Mistretta*, 488 U.S. at 411.

Because the airports are important gateways to the nation's capital, there exists a genuine and, perhaps, unique need for a political mechanism to reflect users' interests as opposed to the comparatively more parochial interests of the involved regional and local governments.

A board of review composed of members of Congress assures the Authority of users' representatives who themselves are the frequent users of airport services. *Mistretta*, 488 U.S. at 396 (quoting *Morrison v. Olson*, 487 U.S. at 676 n.13) ("'This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise.'").

What actually is proposed by respondents is that the federal judiciary cause a state-created body to be dissolved or refashioned along lines which, they implicitly assert, would render it unobjectionable when subjected to a federal separation of powers analysis. This Court, however, has consistently refused to concern itself with the contours of state-created political bodies, except when they actually exercise power in a manner infringing upon some fundamental right of a citizen guaranteed by the federal constitution. See *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) ("[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."). "It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States." *Id.* at 256 (Frankfurter, J., concurring). The Commonwealth long ago determined the extent of prohibitions appropriate to the service of members of Congress within state-created bodies. See Va. Code. Ann. § 2.1-33(8) (Supp. 1990).

While, in general, federal legislators are not permitted to hold "any office of honor, profit or trust under the Constitution of Virginia" (Va. Code Ann. § 2.1-30 (Repl.

Vol. 1987)), a specific exemption permits a federal legislator to be a "member or director of any board, council, commission or institution of the Commonwealth who serves without compensation except one who serves on a per diem compensation basis." Va. Code Ann. § 2.1-33(8).

Respondents, therefore, have no standing to raise the essentially political issue of how the Commonwealth chooses to distribute power in a political structure it creates among members of Congress serving in their individual capacities.

As early as 1911, this Court encountered a litigant, like the respondents before it today, that was seeking to destroy a political structure erected by a state solely because of its disagreement with some action taken within that political structure. See *Pacific Telephone Co.*, 223 U.S. at 118. This Court grasped immediately that the litigant's constitutional attack on the state's political structure raised a political question by which the litigant could attack indirectly an utterly unremarkable, though disagreeable, tax law. This Court's response was to prohibit that constitutional attack:

How better can be broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into

operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

223 U.S. at 150-51.

The respondents likewise are at a loss to articulate how the political structure of the state-created Authority contributes to their unhappiness with the duly adopted master plan's alleged role in the production of noise and safety problems. Like the litigant in *Pacific Telephone Co.*, however, they have readily discerned that the effective destruction of the political body that had exercised power in a manner they deemed objectionable would relieve them of the necessity of proving that some specific exercise of power had infringed *their* rights.

Permitting private parties to avoid pleading an infringement of their *own* rights in favor of allowing them merely to attack directly the federal constitutionality of a state-created political structure would effectively destroy our federal system:

Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.

*Youngstown Co.*, 343 U.S. at 594 (Frankfurter, J., concurring).

Where a commercial enterprise like this Authority has come into being, much deference is required to be accorded its legislative underpinnings by the federal judiciary. *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) at 400-01. That deference should increase where, as here, the political will of the legislative and executive branches of a nonfederal sovereign was deliberately enlisted by the federal political branches to set the enterprise in motion.

### CONCLUSION

Presumably lacking any basis for charging an infringement of their own rights, respondents have resorted to the broadest of constitutional attacks on a state-created political structure to destroy it. If they succeed, the damage done to our federal system and the

commercial enterprise erected within it will be out of all proportion to any transitory gain appellees may achieve.

Respondents' "fears for the fundamental structural protections of the Constitution prove, at least in this case, to be more 'smoke than fire' ". *Mistretta*, 448 U.S. at 384. The board of review poses no threat whatsoever to the dynamic balance struck in the constitution between the political branches of federal government. The Authority does not exercise federal executive authority, let alone broad federal executive authority, in areas of broad national concern. It exists "solely to operate and improve" two airports serving the metropolitan Washington area. Ch. 665 § 5(B), 1987 Va. Acts, *supra* (App. 113a). It closely mirrors the governmental structure of airports across the nation.

Amicus respectfully urges this Court to reverse the decision of the court of appeals.

Respectfully submitted,  
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